UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

CHANCE McCURDY,

Plaintiff,

v. 17 Civ. 5168 (GHW)

CORRECTION OFFICER J. MITCHELL and CAPTAIN OF CORRECTIONS BELL,

Defendants. Jury Trial

----------x

New York, N.Y.
September 3, 2019
9:10 a.m.

Before:

HON. GREGORY H. WOODS,

District Judge

APPEARANCES

THE LAW OFFICE OF FRED LICHTMACHER, P.C.
Attorneys for Plaintiff
BY: FRED LICHTMACHER, ESQ.

NEW YORK CITY LAW DEPARTMENT
OFFICE OF THE CORPORATION COUNSEL
For Defendants
BY: BRACHAH GOYKADOSH, ACC
OMAR J. SIDDIQI, ACC

(Case called)

THE DEPUTY CLERK: Counsel, please state your name for the record.

MR. LICHTMACHER: For the plaintiff, I'm Fred Lichtmacher. Good morning, your Honor.

THE COURT: Thank you. Good morning.

MS. GOYKADOSH: Brachah Goykadosh on behalf of defendants Captain Bell and Correction Officer Mitchell. Good morning, your Honor.

THE COURT: Good morning.

MR. SIDDIQI: Omar Siddiqi for the defendants also. Good morning, your Honor.

THE COURT: Good morning.

And you're joined at counsel's table by?

MS. GOYKADOSH: This is Captain Bell, your Honor.

THE COURT: Thank you. You can be seated.

Good. So thank you all for being here. Let's proceed. There are a number of issues that I have on my agenda for discussion at the outset of the trial day, so let's proceed.

So there are a number of issues I have on my agenda for this morning. Those include scheduling issues; I hope to discuss Mr. McCurdy's production issues; I hope to discuss the joint pretrial order, which I circulated or had circulated over the course of the weekend with the modifications reflecting our

discussions at the final pretrial conference; I will rule on the pending motions *in limine*, both those that were raised at the final pretrial conference as to which I reserved -- namely, the proposed exclusion of certain pieces of evidence under Rule 26(a); and then I will also hope to discuss the positions of the parties with respect to what I will describe as the lack of medical experts issue.

So counsel, is there anything that you would like to raise beyond that agenda or to ensure that we include in the agenda during the window before the jury arrives? Counsel?

MR. LICHTMACHER: There's one issue I would like to raise; small one. And we would like the Court to take -- well, obviously, the most important issue is Mr. McCurdy's production, and I'll explain what I know about that in a second. But I'd like the Court to take judicial notice that assault on a peace officer, pursuant to 120.08 under the New York Penal Law, is a felony.

THE COURT: Thank you. Let's take that up. I'm not sure what the context is of that request. Can you provide me more information.

MR. LICHTMACHER: Certainly. Mr. McCurdy is alleged to have slugged Officer Mitchell in the face. That's a felony, a D felony, I believe, 120.08 under New York Penal Law. He was not re-arrested and charged with that felony. So before I preach, talk about what the law is to the jury, I'd like to get

the Court's acquiescence as to that.

THE COURT: Thank you. We'll discuss that separately. I want to give defendants the opportunity to consider their position. I will also benefit from their argument with respect to this issue, particularly to the extent that the idea is that nonprosecution means nonoccurrence of a fact. There may be questions about that understanding; in the same way that there may be questions about whether an arrest means the occurrence of a fact, the question of whether or not a nonprosecution means the nonoccurrence of a fact; something that we may wish to discuss in the context of the request, as I understand it to be posited. But we can take that up separately. I will include that on a list of issues for follow-up.

Good. Anything else?

MR. LICHTMACHER: Nothing further. Of course Mr. McCurdy's production. If the Court would like an update on what I've done.

THE COURT: Please.

MR. LICHTMACHER: All right. First of all, for what it's worth, my sincere apology. I did make a mistake. I thought she had written the writ the way I had sent it to you after the corrections were noted. And clearly it's my error, and I know I'm wasting a lot of people's time since he's not produced today, so I'm falling on my sword. This is clearly my problem -- my fault; everybody's problem.

We spoke to GRVC; I went to GRVC; I sent someone to MCC. Everybody received a fax of the writ. The Marshal had originally taken three copies, and although it's not a defense, just usually when we do writs, or when I've done writs, I've done them for state inmates, you deliver a fax to the state, it's over, everything's taken care of. Obviously it's different, and obviously I knew that because the trial was adjourned the first time, I served it on everybody, all three entities that had been required by Judge Cote at that time. Nevertheless, MCC actually informed my process server -- and he went back again yesterday -- that they were closed for the weekend, any executive type offices. GRVC has told me the same thing.

I spoke with MCC about 20 minutes ago. They have not received any inmates today from Rikers, and usually they do get people, so they said they didn't receive anybody as of yet today. So I've been in constant contact with them. As I said, I ran over; I had sent someone to MCC, as I told you; I went to GRVC myself -- and by the way, I was able to see my client there.

THE COURT: You were able to see him?

MR. LICHTMACHER: Yeah. I knew I could get into GRVC. Took me a couple of hours, but I was able to get in. So that part is not problematic. Obviously the production is the problematic part. And I'm hoping this doesn't majorly delay

this from going forward, and I'm still optimistic that they will bring him today, because everybody does have the paperwork they need at this point, and they've had it for a while. I understand they didn't work on the weekends, but if he's produced now, I think the only one that was prejudiced is that I had to take a slightly longer ride to go see him in GRVC, if he's produced now. If not, I understand, of course, the problems for the Court and my adversaries and everybody involved.

THE COURT: Good. Thank you.

So the question presented is: What happens if he's not produced, in counsel's words, now? That is a question, a substantial one.

Counsel for defendants, you submitted a letter yesterday with respect to this topic, so I believe I understand your position. Nonetheless, let me invite any comments with respect to your views regarding how we should proceed in the event that Mr. McCurdy is not produced prior to the time established for jury selection.

MS. GOYKADOSH: Yes, your Honor. We did submit that letter yesterday, and our position is in that letter. I would reiterate that we've been waiting for this trial for quite some time, and, you know, the two defendants in this case are prejudiced by further delay. So we think we should start today. Mr. Lichtmacher is certainly competent counsel for

plaintiff, and he can pick a jury, and he can question any witnesses before Mr. McCurdy arrives. So we're ready to start.

MR. LICHTMACHER: Your Honor, I specifically asked Mr. McCurdy that without waiving attorney-client privilege, as to that one question, if he would acquiesce to me picking a jury without him, in case there was a problem with production, and he said absolutely not. So he said it politely, but he was clear that he wants to be here for jury selection. And I think he's prejudiced by not being here when the jury comes in. You know, sometimes you can tell things by the way the jury looks at you, you know, whether or not -- there's various things you can do by observing the jury that you can't do without your client here.

So I would beg to differ with my adversaries. And Mr. McCurdy has waited just as long for this trial as they have.

THE COURT: Thank you.

So this is a difficult question. I appreciate, counsel, your acceptance of the responsibility for the nonproduction. Ultimately, I agree that there is some prejudice to Mr. McCurdy in the event that we proceed without him present. It's a challenging issue, in part because of the schedule.

Let me just highlight some of the issues presented.

Counsel, as you know, this trial has been adjourned

several times, but let me focus at the outset on the immediate scheduling issues. That is the following: Today is a Tuesday because it's a holiday week. As a result, if we wait to select a jury until tomorrow, when Mr. McCurdy hopefully will be produced -- and I should say, I will ask someone from my staff to also reach out to the Marshals to see if they can find out any information. But if we wait until tomorrow to select a jury, we will be beginning the trial on the Wednesday of this week. During our conference shortly after this case was re-assigned to me, I inquired if the parties could move the trial to next week because it would have been more convenient for me, and there were scheduling issues from defendants' side that prohibited that. I believe that those involved a conflict for Mr. Siddiqi and also for one or more of the individual defendants. So my concern is, given the prospect that this trial could last in excess of a week -- I'm going to tell the jurors approximately a week and a half -- that if we defer commencement of the trial until tomorrow, that functionally we will run up against the same scheduling issues from defendants' side that prohibited them from consenting to proceed to trial next week. I recognize that this could potentially be a two-stage trial involving both the individual claims of liability as well as the *Monell* claims, and so that I fear may very well run into next week.

So counsel, I appreciate that Mr. McCurdy wants to be

here, and I appreciate that there is prejudice associated with it. What I'm going to do is to, barring further argument -- and I will open the floor to further argument -- I'm inclined to proceed. If I were to proceed, I would instruct the jurors that Mr. McCurdy was not here through no fault of his own, and that they were not to speculate as to the reasons for his nonappearance, and that they should not hold that against him in any way. I recognize that there's benefit to having the input of a client during jury selection, but I'm concerned, for further reasons that I'll articulate later, that that may not be possible, given the scheduling issues. My hope is that an instruction of the sort that I just described would help to address the kind of prejudice that you've just suggested. It does not address the fact that the jurors will not be looking at the plaintiff during the course of jury selection and whatever incremental information that you might get from their visual responses to him -- which I accept may be present, to some degree -- wouldn't be available as a cue.

So any further argument on this? And then I expect to rule. Counsel for plaintiff?

MR. LICHTMACHER: My concern, your Honor, is, GRVC has been having problems producing people anyway. This one is my fault; that's not what I'm saying here. But they've been having problems. I know from another client of mine, who was supposed to be produced to a housing court, who I saw also when

I went to GRVC this weekend, was supposed to be produced to housing court, and I was just giving papers; met him there. I didn't write the writ, the judge had ordered it, and they didn't produce him to housing court last week. So apparently it's the procedure, or for whatever reason, it's been difficult at GRVC recently. And I know this for a fact. I mean, I know this. I sent a process server down to meet him with papers, we had people go down there to meet him at the court, and this was not through my office or my failure to produce the writ. So this seems to be not unusual right now. If the Court can do anything to move this process along. I'm afraid we'll start and then Mr. McCurdy isn't produced even tomorrow, and I don't think -- I may be wrong, but I don't think we get to his testimony until tomorrow anyway. I intend to call Mitchell, who I don't see here yet, Officer Mitchell, Captain Bell, and then McCurdy.

And another issue is, I'm concerned -- I wonder if Officer Mitchell, Correction Officer Mitchell, is going to be here today. I did inform my adversaries he was who I was going to call first.

THE COURT: Good. Good. Thank you very much.

So as I say, I will ask a member of my staff to reach out to the Marshals to inquire as to the status. If there's anything that I can do to facilitate his timely production, I will do so, with the assistance of my staff, momentarily. Let

me just get through a number of issues.

So with respect to this, I appreciate again the concern related to the fact that Mr. McCurdy is not here. It's a difficult issue. I'm sorry that we're in this situation. As noted, I recognize that it has some adverse impacts on Mr. McCurdy. Unfortunately, ultimately, however, balancing all of the concerns presented here, I believe that we should proceed.

First, let me say that if I could reschedule the trial for next week, I would, but I cannot. For the reasons that defendants put on the record during our prior conference, they cannot proceed that week. After next week, I don't have availability to schedule a trial until next year in the late spring or summer, so if we hit against a hard stop for this trial of next week, unfortunately, we'd be looking at deferring this trial not just for a matter of weeks but for a matter of another seven or eight months. Given that the parties have been working so hard to get this case to trial and the prior adjournments, I don't believe that that would be appropriate. As counsel know, this trial has been adjourned twice before, and it was in large part because Judge Cote believes that it was important to hold to this third trial date that it was transferred back to me when a conflict arose on her schedule.

Now because the trial has been twice previously adjourned and because this trial date has been long scheduled,

I understand the prejudice to Mr. McCurdy as a result of his absence during witness testimony, but I'm pleased to hear that counsel had the opportunity to confer with his client over the weekend at the GVRC so that at least that was able to go forward.

Counsel and the parties have had ample time to prepare for the trial. In order to address the prejudice from his absence here in front of the jury, I'm going to instruct the jury that he is here through no fault of his own and that they're not to speculate as to the reasons for his absence or to hold that fact against him. If the parties have proposals regarding specific language for such an instruction, I invite them.

Counsel for defendants have articulated the prejudice resulting to them from further delay. Those are put on the record in their letter that was submitted to the Court yesterday. I accept those protestations and prejudice to them as a result of further delay, particularly given that I believe that as much as a day delay could functionally turn into a multi-month delay because of their scheduling issues next week and I'll call it the Court's calendar, in connection with this civil, noncriminal matter.

I also am concerned about the interests of the jurors. Fundamentally having the jurors sit around for a whole day in order to permit Mr. McCurdy to be here for purposes of jury

selection means that we are misusing the time of a number of our fellow citizens who are here to do their civic duty.

It also has an adverse impact on the Court's schedule. As you know, I cleared my schedule for the purpose of going forward with this trial this week, and deferring further has an adverse impact on my schedule.

So ultimately I feel badly for Mr. McCurdy. I would very much like for him to be here, as everybody would. Ultimately, I believe, balancing all the factors, this is an equitable result. This is not Mr. McCurdy's fault, but the responsibility falls with Team McCurdy, I'll call it. And so I believe that we should proceed.

Now with respect to the joint pretrial order, I asked my clerk to email all of you a revised copy of the order last night. Counsel, any comments on the revised order, which I modified in order to show those modifications that I believe grew from our discussion?

MR. LICHTMACHER: Your Honor, I would have thought that you would have just incorporated the exhibit list that I delivered to the Court with the numbers in there, and I'm a little -- yeah. That's what I would have thought the Court would have done. Because I did deliver such a document to you. I have another copy if you need it.

THE COURT: Thank you. To be clear, counsel, you were supposed to do that work before you sent me the joint pretrial

order. Again, I am temporizing because of the failure by you to do the clearly required work. So the document that I sent to you I believe accurately reflects the exhibit references from your list, but fundamentally, I request that the parties put together an evidence list in advance of trial to include that in the joint pretrial order. I and my staff are not here to do the work that you should have done. I did a substantial amount of that work by trying to identify, from those things that you put into the joint pretrial order, those things that are your proposed exhibits. So I apologize if this was not done in the way that you would have preferred. I'll simply note that you had the opportunity to present to the Court a list in the way that you would have preferred by following my orders regarding the contents of the joint pretrial order. So counsel, we are dealing with the circumstances as they have developed based on the information presented to the Court and the timing upon which it was so presented. Given that, is the information that's included in the joint pretrial order accurate?

As counsel for plaintiff is looking at that, counsel for defendants, any comments on the Court's modifications to the joint pretrial order, which I hope to enter promptly?

MS. GOYKADOSH: No, your Honor. No comments on the Court's modifications to the JPTO. However, I will respectfully note that Correction Officer Mitchell is not here

yet. I have been informed a few minutes ago that he is almost here, and I apologize to the Court for his lateness.

THE COURT: That's fine. Good.

Counsel for plaintiff.

MR. LICHTMACHER: Well, I am a little confused by it, the way you drafted it. It does -- yeah, I am a little confused by it. I mean, things are knocked out that I think we agreed -- 11, 12, all the incident photos, I thought we agreed -- I believed we had agreed would come in, were not objectionable. And I just got those, the color photos from them recently. So that's my main problem is 10, 11, 12, 13, and 14, as well as 15, Exhibit 15, my Exhibit 15, those I'm a little surprised don't seem to be in, your Honor.

THE COURT: Thank you. So let's go through each of these.

Counsel, which exhibits in particular do you believe have been excluded that should be included?

MR. LICHTMACHER: Well, okay. As I said, all the incident photos, 10 through 14, which are simply photos that they provided that show what he looks like, you know, and depicted by them, which I don't think they were objecting to.

I'll pull out the exact photos.

THE COURT: Thank you.

So counsel, if you look to the bottom of the page, you'll see the asterisks. So the issue here is that in the

joint pretrial order presented, rather than providing an exhibit number or reference that correlates to an exhibit or exhibit reference that one might introduce, you did not do that. Instead, you gave us Bates stamp ranges.

MR. LICHTMACHER: That's true, your Honor.

THE COURT: Among the Bates stamp ranges you provided were D860 through 969. As evidenced by the ultimate set of exhibits presented to the Court, you do not intend to put in all of those pages; instead, you intend to put in certain of them. And so if you look to where it's crossed out during that Bates stamp range, you'll see a double asterisk. A double asterisk notes Exhibit 9, with the specific D range, 860; Exhibit 10, which is D875; Exhibit 11, which is D895; and so on. So if you can look to the entirety of the documents when making your comments to the Court, I would benefit from it. It would expedite our discussion.

MR. LICHTMACHER: I'm still a little confused. I'm sorry. I am a little confused as to what this indicates. The double asterisk means that they're not being objected to? They're in? I just want to make sure I'm clear before I try to present it.

THE COURT: Thank you. Nothing is in. There are objections --

MR. LICHTMACHER: I didn't mean that. I meant, you know --

THE COURT: Thank you. What is not in is the entirety of the Bates stamp range 860 to 969. You have not proposed that it come in. So the reference to D860 to 969 has been excluded. However, the double asterisk is intended to reflect that the actual exhibits presented to the Court that fall within that Bates stamp range are proposed to be introduced.

MR. LICHTMACHER: Thank you.

THE COURT: Those are D9 through 15.

MR. LICHTMACHER: Thank you, your Honor. I did not understand that.

Now most of the other documents that are precluded are impeachment -- or have not specifically appeared on the JPTO are actually impeachment documents, your Honor, so I don't believe they have to be part of the JPTO. I see nothing in the rules that says that impeachment documents must be included in the JPTO, unless I missed something. I missed enough here that I don't want to miss something else.

THE COURT: Thank you. I'm not going to take a position on that at this point.

The other things that have been stricken from this list are either things that were not produced as part of the actual exhibit list, which is most of them, frankly, and I actually think that that's almost everything.

Good. So anything else before I execute the joint pretrial order? Counsel?

MR. LICHTMACHER: I just want to be clear, before I make any error, that I see nothing in your rules -- not to be redundant -- about impeachment material having to be listed in the joint pretrial order.

THE COURT: Thank you.

Impeachment meaning a document that you would present in the event that there's contrary testimony?

MR. LICHTMACHER: Contrary testimony; correct, your Honor.

THE COURT: Thank you.

I'll take that up separately if and when any such exhibit is offered for potential use. It would not be introduced, as I understand it, as proposed, as direct evidence.

MR. LICHTMACHER: And that is what I did write in my motion *in limine*, I believe, and we agreed at the conference that I'd approach first before using those emails. Thank you, your Honor.

THE COURT: Thank you.

I'm executing the joint pretrial order with the modifications that I've submitted to the parties.

I have just done so.

Good. So let me take up the motions *in limine*.

First, there's a motion *in limine* to preclude plaintiff from introducing undisclosed exhibits. During the

final pretrial conference held on August 27, the Court reserved judgment on defendant's motion to preclude plaintiff from introducing three exhibits which were not produced in discovery, not disclosed by plaintiff within the time frame set forth in Federal Rule of Civil Procedure 26. Those documents are: Plaintiff's Exhibit 16, the Nuñez consent judgment; and Plaintiff's Exhibits 20 and 21, two photographs published in the Daily News in May 2014. The Court is now prepared to rule on defendants' motion. I'm sorry for reserving on that. I did not want to take up further time. I wanted to consider the arguments presented by the parties during that conference before ruling.

"Rule 37(c)(1) provides that any 'party that without substantial justification fails to disclose information required by Rule 26(a)... is not, unless such failure is harmless, permitted to use as evidence at a trial... any witness... not so disclosed.'" *Patterson v. Balsamico*, 440 F.3d 104, 117 (2d Cir. 2006).

In determining whether exclusion is warranted under Rule 37(c)(1), the Court should consider: "(1) the party's explanation for the failure to comply with the [disclosure requirement]; (2) the importance of the [precluded evidence]; (3) the prejudice suffered by the opposing party as a result of having to prepare to meet the new [evidence]; and (4) the possibility of a continuance." *Id.* (Quoting *Softel, Inc. v.*

Dragon Medical and Scientific Communications, Inc., 118 F.3d 955, 961 (2d Cir. 1997).

Here, plaintiff does not dispute that he failed to disclose these documents within the time frame set forth by Rule 26. Furthermore, the mere fact that the Nuñez consent judgment was referenced in the plaintiff's second amended complaint does not excuse his failure to disclose that document; nor does the fact that the document was in the possession of the defendants excuse that failure. Accordingly, I evaluate the issue weighing the factors articulated by the Second Circuit in *Balsamico* to determine whether they favor preclusion of these categories of evidence.

Factors 1 and 4 favor preclusion of both documents. Plaintiff has offered no justification for his failure to disclose these documents. Indeed, although plaintiff failed to submit any opposition to defendants' motion within the time period required by the Court's local rules, the Court gave counsel the opportunity to present argument regarding the application of the *Balsamico* factors during the final pretrial conference held on August 27, 2019, even being presented with an additional opportunity to respond. Plaintiff still did not offer any substantive explanation for his failure to produce these documents in discovery.

The fourth factor -- the possibility of a continuance -- also weighs in favor of preclusion. A trial in

this matter has already been adjourned twice in the past five months. The Court will not entertain yet another adjournment of trial in order to account for the consequences of plaintiff's late disclosures.

Factors 2 and 3 favor preclusion of the Daily News photographs but not, in my view, the Nuñez consent judgment. Plaintiff did not simply reference the Nuñez consent judgment in his complaint but rather explicitly stated that the Nuñez consent judgment provided the basis for one of his theories of *Monell* liability. Although such a reference did not obviate plaintiff's obligation to disclose his intent to introduce the judgment as an exhibit at trial, plaintiff's reliance on the document in his complaint both underscores the importance of the judgment to his case and defendants' awareness of plaintiff's intent to rely upon it. Furthermore, the Nuñez consent judgment was executed by the City of New York. It is essentially defendants' own document. While the Court recognizes that there is some risk of prejudice to defendants if plaintiff is allowed to introduce this document despite its late disclosure, defendants were effectively on notice of plaintiff's intent to rely on the judgment at trial and had more than adequate time to develop rebuttal evidence, much of which I assume might come from the defendants' own witnesses. Accordingly, the Court will not preclude plaintiff from introducing the Nuñez consent judgment at trial based on his

failure to disclose the document timely pursuant to Rules 26 and 37. However, the Court notes that the admissibility of this document may be subject to other evidentiary considerations on which the Court expresses no opinion at this time.

Based on its analysis of factors 2 and 3, the Court does conclude that the Daily News photograph should be precluded. Unlike the Nuñez consent judgment, these photographs specifically were not specifically mentioned in plaintiff's complaint, although the complaint did generally reference newspaper coverage of the events depicted in the photographs. And also, unlike the Nuñez consent judgment, the Daily News photographs are not the defendants' own documents. Plaintiff's failure to produce the photographs in discovery deprived defendants of the opportunity to conduct their own discovery regarding the photographs, specifically to investigate the source of the photographs, whether they're accurate depictions of the events at issue, and in particular, whether or not the images had been edited, either with respect to cropping or coloring, the Daily News may have edited them or selected them in a way to present the most prurient version of the incident. It's also not clear to the Court that these photographs are central to plaintiff's case. Subject to any objections from defendants, plaintiff can easily testify about the events underlying the photographs without introducing the

photographs themselves. I recognize that they dramatize the incident, but they were also clearly available and could have been produced earlier, in which case I would not have been presented with this question.

Accordingly, the Court grants defendants' motion to preclude plaintiff from introducing the Daily News photographs -- that is, Plaintiff's Exhibits 20 and 21 -- but denies defendants' motion to preclude plaintiff from introducing the Nuñez consent judgment on this basis.

Now I'd like to turn to the defendants' motions *in limine* regarding the plaintiff's medical records.

On August 29, defendants filed a letter with the Court requesting that the Court: (1) preclude plaintiff from testifying that he suffered a wrist injury as a result of the incident in this case; (2) preclude plaintiff from testifying that the number of radiological examinations that he received is indicative of any injuries; and (3) require plaintiff to redact any terms from his medical records that are beyond the province of a lay jury.

With regard to plaintiff's second request, plaintiff has represented to the Court that plaintiff will only testify that such examinations were performed at the request of the healthcare professionals who examined him after the incident. The Court takes from plaintiff's representations that he does not intend to testify that the number of examinations that he

received is indicative of any injuries. Therefore, defendants' motion is denied as moot.

Now counsel for defendants, what's the legal basis for your first request -- namely, that I review the medical records, make a factual determination that his wrist was not broken, and then deprive him of the opportunity to testify about his injuries on that basis? What's the legal basis for that position, counsel?

MS. GOYKADOSH: Maybe my letter was unclear again, or maybe I'm just misunderstanding. What we would like to be precluded is plaintiff should not be allowed to testify about the cortical step-off, as an expert is required to define that term for the jury. It's beyond the province of the jury. So while I understand that Mr. McCurdy might testify that his wrist is broken, or was broken, using the term "cortical step-off" is what we're asking to be precluded.

THE COURT: I'm sorry. Let me just take a brief moment.

So to be clear, counsel, where in your letter you say, "Defendants respectfully request that the Court: (1) preclude plaintiff from testifying that he suffered a wrist injury as a result of this incident," I should not read that to mean those words?

MS. GOYKADOSH: I'm sorry, your Honor. On page 2 of 3, I wrote, "This evidence should be precluded for two

reasons." First, as the Court stated, the term "cortical step-off" is beyond the province of the jury; and second, an expert is required to explain what this injury is. So I believe that those words could have and should have been clearer when I put them on the last page, but what I'm referring to is what's on page 2. So I apologize to the Court for that lack of clarity.

THE COURT: Thank you.

So you're not asking for me to preclude the plaintiff from testifying that he suffered a wrist injury; instead, you are asking that I redact or not permit the use of terms from the records that are beyond the province of the jury, which is the third request in your letter. I understand that you're saying that the first request in your letter means the same thing as the third.

Good. So let me hear from plaintiff on this. Counsel, what is it that you are seeking to introduce? The focus here is, as I understand it, on Exhibit 14.

MR. LICHTMACHER: Well, 15 and 8, your Honor, I think we're talking about. Really --

THE COURT: I'm sorry. I'm sorry. Pardon me. Pardon me. That's not the first time I've done that. I'm referring to Exhibit 19. Pardon me.

MR. LICHTMACHER: I think you were referring to Exhibit 8, your Honor, from the 2/9/15 medical records. 2/9/15

medical records. I believe that's what you're referring to.

THE COURT: No. Exhibit 19, which are the medical records related to --

MR. LICHTMACHER: That's the 2014 incident, your Honor.

THE COURT: Thank you. I'm sorry.

MR. LICHTMACHER: That's okay.

No. 8 is the Elmhurst medical from 2/19/15.

THE COURT: Thank you.

Good. So what precisely is it from these records that you seek to introduce? I fear, reading the parties' exchange of letters, that there are ships passing in the night with respect to this issue. What is it that you are seeking to introduce from this set of records?

MR. LICHTMACHER: Well, first of all, plaintiff, as I indicated earlier, has no intention of testifying to any medical terms. I doubt he's read that or knows what it means. So he intends to testify, if I understand correctly, that his wrist was injured, period. I mean, he doesn't intend to say cortical step-off.

And secondly, he would like to testify -- and I raised this in my last submission to the Court, which, again, was late -- that he would like to testify -- I think that letter was dated yesterday or the 1st. I've been running around the jail. But anyway, I believe I indicated he'd like to say that

it's his emotional state, when it's indicated to him that he may have a fractured wrist, and that doesn't go to --

THE COURT: Thank you.

For the record, we've just been joined by Officer Mitchell.

Officer Mitchell, do not be late for an appearance in my courtroom again.

MR. MITCHELL: I apologize, your Honor.

THE COURT: Thank you.

Please proceed.

MR. LICHTMACHER: Number one, it goes to his medical state. Well, to be clear, he's not going to say "cortical step-off," period. He's not going to say that. Neither am I, okay? So I will not say it either.

Number two, he wants to testify to the fact that the doctors told him, "We think your wrist is broken." He doesn't receive enough future treatment and diagnosis at Rikers to actually make a determination of that until it would be far too late to see if it was chronic or acute. Now that's not his fault.

THE COURT: Thank you. Can I just pause you. And I appreciate this line of argument. It's very helpful.

I understand what it is that the plaintiff expects to say based on our conversation from the prior conference, and I will say that I believe that the general guidance of the Court

was that the line of testimony that you've described and the decision by Judge Matsumoto that you quoted in your most recent letter is consistent with my comments -- namely, that the type of testimony that you've described is within bounds. I'm not addressing what may be a hearsay statement on behalf of the doctor or the issue that you raised in your letter yesterday. This is why I was concerned about the ships passing in the night. That's because Exhibit 8 is one of the exhibits that you have proposed to introduce. It contains a lot of medical terminology, and the defendants are concerned about the prospect that this entire record would go before the jury without any explanation or context. So are you planning to put in Exhibit 8?

MR. LICHTMACHER: I am, your Honor.

THE COURT: And if so, to what end?

MR. LICHTMACHER: I would like to just submit it to the jury. It confirms that he was in fact brought to the hospital, that they did look at him, they diagnosed certain things, they tested different areas of his body. An inmate cannot say, Hey, I want to go to the hospital and I want you to take x-rays of these parts of my body. Can't do that. He's not allowed that freedom to do that.

So if you want me to redact the more technical terms in it, that would be fine. I have no objection to that. But they should see the record, they should see the substantial

medical record that he had generated on the 19th, and the fact that, you know, they are looking at different parts of his body, and it's consistent with what he testified to at his deposition, that he was injured in X, Y, and Z, and they're looking at X, Y, and Z. So that's all I really want to enter it for. If there are any necessary medical redactions for very technical terms, I have no issue with that.

THE COURT: Thank you. Good. That's very helpful.

So counsel for defendants, I understand that there is functionally no debate regarding whether or not certain -- I'll call it highly complex medical opinions or diagnoses that may be confusing to the jury without the benefit of an expert to testify as to their meaning is warranted; namely, defendants have requested it and plaintiff has stated that plaintiff is willing to make appropriate redactions. Counsel, given that, what's your response, counsel for defendants?

MS. GOYKADOSH: Your Honor, to the extent that the appropriate redactions are made, I believe that does solve the issue of the medical terminology in submitting a document with a lot of medical terms on it to the jury, so I think redacting it would solve that issue.

THE COURT: Good. Thank you.

So counsel, I'm going to direct you to spend some time proposing appropriate redactions and working through them with respect to this document.

Let me just say a couple of words generally. The parties have agreed on redactions to this document. I will let you work together to find them. The underlying concern that motivates defendants' comment, I will note, goes in both directions. There is a legitimate concern that the use of -- I'll call it complex medical diagnoses without the benefit of a medical expert will confuse the jury. That's the motivating impulse that underlies defendants' request and as to which plaintiff has just consented. Again, I just note that this is a concern that goes in both directions. In other words, defendants should not expect to point to a complicated medical term and say: "This means that you do not have a fracture, does it?" if the terminology or statement is similarly complex. So the redactions that we will be implementing here with respect to these issues will work in both directions, to be very clear. Fundamentally, the issue that we're presented with is the consequences of both parties', frankly, unexplained and to me somewhat inexplicable decision not to call a medical expert in connection with a case that involves complicated medical issues and proof. The work-around here behind that failure is the issue that generates this concern.

So counsel, please do work to identify the redactions that you believe are appropriate here. You should present them to the Court promptly. I expect that they'll be presented to the Court no later than -- let's call it 7 p.m. today. I hope

and expect that the records will not be at issue during the course of today's trial day.

MR. LICHTMACHER: Your Honor, when you say presented to the Court, would you like us to email it? Because I don't think these medical records should go on the ECF, correct?

THE COURT: Yes, that would be fine. You can email it to me. I would appreciate that. I note that every document that's presented to the jury in the trial is presumptively a matter of public record. That said, it does not go up on the docket, but a document that goes into evidence at a public trial becomes a matter of public record, and presumptively the public is entitled to access it.

Good. So counsel, I will defer adjudication of that issue, understanding that the parties have substantively agreed to appropriate redactions consistent with the defendants' suggestion.

I'm not yet taking up the additional suggestion by counsel for plaintiff that plaintiff be permitted to comment regarding statements made to him by medical professionals during his stay. After I've gone through the rest of the issues in my agenda, I will invite comment from defendants on that issue.

MS. GOYKADOSH: Your Honor?

THE COURT: Yes, counsel.

MS. GOYKADOSH: Will you be ruling on the issue of

whether or not plaintiff can suggest or argue to the jury that the number of radiological exams is somehow indicative of any injury?

THE COURT: Thank you. I've already commented on that. What I said was the following: "With regard to defendants' second request, plaintiff has represented to the Court that plaintiff will only testify that such examinations were performed at the request of the healthcare professionals who examined him after the incident. The Court takes from plaintiff's representations that he does not intend to testify that the number of examinations he receives is indicative of any injuries. Therefore, defendants' motion is denied as moot."

MS. GOYKADOSH: Thank you, your Honor.

THE COURT: Thank you.

Good. So let's talk about the plaintiff's motion *in limine* to preclude the defendants from referencing plaintiff's current pending charges. First, is there any additional argument on this? Mr. Lichtmacher submitted supplemental briefing on this point. Counsel for defendants?

MS. GOYKADOSH: If your Honor is referring to Mr. Lichtmacher's briefing at docket entry 125, we submitted a letter at docket entry 131, and that states our position. If there's any specific issue that the Court would like me to argue on, I'm happy to do so.

THE COURT: Thank you. Counsel, you can do that, or you can just tell me what your position is. Would you like for me to peck through the docket, find the documents, reread them, or --

MS. GOYKADOSH: I apologize, your Honor.

So our position is as follows: What plaintiff argued in his supplemental motion is Rule 608. There were references to Rule 403 and Rule 404; however, that was not argued.

Under Rule 608, the Court can allow cross-examination and allow extrinsic evidence to be inquired into if it is probative of the character for truthfulness or untruthfulness of a witness. In this case, the charges that we're talking about, they include attempting to escape and also -- I apologize. One moment, please. -- and also assault in the second degree of a peace officer. So of the many charges, those are charges that are included.

Both of these crimes, even though they are pending charges, they can be allowed for impeachment on two occasions. First, if plaintiff testifies that he has not been arrested for these charges, that would be proper impeachment materials to ask about it.

The second one is whether those go to his credibility, these two charges. They are not convictions. However, one court in the Eastern District has ruled that convictions for these two charges do go to credibility, escape and -- I'm

sorry. The Court ruled that a conviction for escape does go to credibility.

THE COURT: Thank you.

So why should a charge come in, without a conviction?

MS. GOYKADOSH: It doesn't reach the same level as a conviction, and I don't believe that under the federal rules it has the same 609 analysis. However, I think that it might go to his credibility. To the extent that testimony comes up about him never resisting, never trying to escape from prison, the fact of these charges might be something that implicates plaintiff's credibility.

THE COURT: Thank you.

MR. LICHTMACHER: Your Honor --

THE COURT: I don't need your argument on this. Thank you.

So in a motion that was filed on August 29, 2019, plaintiff asked the Court to preclude defendants from referencing plaintiff's current pending charges at trial. In response to plaintiff's motion, in the document that I've read, together with all other documents that have been filed on the docket today, defendants argue that such questioning may be probative for impeachment purposes, depending on plaintiff's testimony, and would be permissible under Federal Rule of Evidence 608(b).

The Court's reasoning with regard to plaintiff's third

motion *in limine* regarding evidence of prior arrests applies with equal force to this motion. If plaintiff testifies in a way that makes this evidence valuable for impeachment purposes -- namely, if he says that he was never arrested for such an offense or something similar -- defendants should request leave from the Court to inquire regarding plaintiff's current pending charges. Otherwise, the Court grants plaintiff's motion because it sees no justification for the defendants to affirmatively put forth evidence of pending charges against the plaintiff. The mere fact that charges are pending against plaintiff is not proof that plaintiff committed such conduct, and the fact of a charge without a conviction has very little probative value, whereas the prejudicial effect of an unsupported charge without a conviction is very substantial. As a result, it may not be put before the jury.

With respect to the plaintiff's request that I order summations and jury charges in the way that he described as the "Colorado method," I've considered plaintiff's counsel's request that I charge the jury before counsel's summations. I'm going to deny that request. As the parties know, I have already sent you a draft of the charges. You can rest assured that I will hold a charging conference early enough during the trial so that both parties will be fully apprised of the law on which I will instruct the jury in advance of summations, so the expressed reason for charging the jury prior to summations is I

believe adequately addressed by that fact.

I also believe that there's benefit to having the Court have the opportunity to address the jury following the arguments, and in the hopefully unlikely event that counsel oversteps the bounds of proper closing arguments or improperly misstate the law, I would have the opportunity to take that up as part of the charges.

Now, counsel, with respect to demonstrative exhibits, the Court directed the parties to raise any issues regarding the defendants' proposed demonstrative exhibits in your letter, which was submitted on August 29th. The parties did not raise any such issues with the Court. As a result, I understand that you've resolved the issue amongst yourselves and that defendants are still proposing to introduce or to show the jury the proposed demonstrative exhibits without objection. Is that correct?

MR. LICHTMACHER: My understanding is that the defendants want to enter them as exhibits, you know, which is somewhat distinguishable from what I've called a demonstrative exhibit, but if there's a foundation laid and they seek to enter them, I can't imagine, with the proper foundation, I'd object to them. I want to hear what their foundation is when they seek to do so.

THE COURT: Thank you.

Counsel for defendants?

MR. SIDDIQI: Your Honor, our position is that these are not exhibits, they're demonstratives. They'll be used to illustrate testimony that will be given by Officer Mitchell and Captain Bell during the course of their testimony and shown to the jury, with the Court's permission.

(Continued on next page)

THE COURT: Thank you. They will still lay an appropriate foundation for the images, I expect, in the course of that testimony. Is that fair?

MR. SIDDIQI: Yes, of course, your Honor.

THE COURT: Good. I expect that I will permit the use of the demonstratives as described. I would ask that you present copies of them to the Court. I understand that counsel for plaintiff already has them.

Just a few comments. As I noted earlier, I've already sent the proposed charges for the individual liability phase of the case to you. They were emailed to the parties on Saturday. Counsel for plaintiff, I don't understand that you confirmed that you received the charges. Can I ask that you confirm that you received the draft?

MR. LICHTMACHER: I received it, your Honor.

THE COURT: Good. Thank you.

So, Counsel, Please be prepared for a charging conference to be held at the earliest convenient time. I understand that evidence may be relatively short in the earliest stage of this case, and it, therefore, I think would be beneficial for us to be in a position to charge the jury promptly following submission of the evidence. So, Counsel, we may want to take up the charges as early as today, maybe at the close of business tomorrow.

MR. LICHTMACHER: Your Honor, if I may.

THE COURT: Yes.

MR. LICHTMACHER: I do not have a copy with me, so if we're going to do that today, could I be provided with another copy?

THE COURT: Absolutely.

MR. LICHTMACHER: Sorry about that, your Honor.

THE COURT: It's no problem. Good. Just a note on punitive damages. You will see, I do include punitive damages in the proposed charge as part of the jury's instructions for the individual liability phase of the trial. Subject to my decision on defendant's objections to the charge, I expect that any such charge would be presented to the jury at the end of the individual liability phase of the trial. I've already made a variety of rulings regarding the evidence admissible during the individual liability phase of the trial, and counsel should govern themselves according to those rulings.

Give me one moment, please, if you would, Counsel.

(Pause)

THE COURT: Good. So that completes my agenda.

Counsel, anything else that you'd like to raise apart from the described issue raised by counsel yesterday and then this morning, both with respect to comments made by medical practitioners to Mr. McCurdy while he was at the facility and then also the request for the Court to take judicial notice of the nature of certain charges.

Yes, Counsel?

MR. LICHTMACHER: The charges were 120.08.

THE COURT: Thank you.

MR. LICHTMACHER: This is somewhat embarrassing, but I'm on a lot of blood pressure medicine. I do need occasional nature breaks, if it please the Court. I don't know, some judges like to go straight through in the morning without breaks. It would be difficult for me.

THE COURT: Thank you. Let me just say a few words. Please don't hesitate to let me know. I'd be happy to take a break at any time to accommodate you. So please don't worry about that at all. It would certainly be my preference to go through, but I also have absolutely no problem stopping, and you should not hesitate to let me know if you need a break. Just let me know either through my clerk or my intern or my deputy for the trial. If I don't see you, please feel free to make a signal that one of them will perceive.

MR. LICHTMACHER: I do appreciate that, your Honor.

THE COURT: It's not a problem at all. Please do not hesitate. Health comes first. It prompts me to say one brief word about something that I do that is a little bit unusual. I sometimes stand up during the trial. I do not stay seated throughout the entire course of the trial. I will sometimes stand over here. I don't move around a lot. I try to be as discrete as possible, but I just don't like to sit all day if I

have the choice. I can't give you that option, but you will see that I do give the jurors that option and invite them to stand if they like during the course of the trial so long as they are not being disruptive and so long as their fellow jurors can see the witness.

So I just wanted to make that note of something that I do so that you're not surprised, and you should not be surprised that I'll give that instruction to the jurors as well. I think it's helpful for them both to stay awake and also good for their health.

Good. Anything else that we should take up before I turn to those other issues?

Yes, Mr. Siddiqi.

MR. SIDDIQI: Your Honor, I have a very quick procedural question.

THE COURT: Please.

MR. SIDDIQI: Because plaintiff is calling the defendants as part of his case in chief, I'm just wondering what is your preference or your rule in terms of the room that we have to ask leading questions of those witnesses when it's our turn to do the questioning.

THE COURT: Thank you. You may not lead. They are still your witnesses.

MR. SIDDIQI: OK. Thank you, your Honor.

THE COURT: Good. Counsel, anything else?

MR. LICHTMACHER: Nothing further from the plaintiff.

THE COURT: Good. Thank you.

I should say -- I should moderate my comment. As you know, there are always circumstances in which it's appropriate to lead a witness, but you should expect that I will treat your examination of your witness in the same way as if you had called them for direct examination. So I will permit some leading under the circumstances where I believe it's appropriate where it will help us solicit information in an efficient way or to set the scene, but you should not treat them as if they were a hostile or adverse witness, just to clarify my rulings.

MR. SIDDIQI: Just a very quick question, your Honor.

Would it be fair to assume that if I am asking questions in an area that has already explored by Mr. Lichtmacher, that I could lead within that area?

THE COURT: No.

MR. SIDDIQI: Thank you, your Honor.

THE COURT: Thank you. Good.

So let's take up each of the issues that have been raised by counsel for plaintiff more recently.

First is the request from his letter from yesterday that the plaintiff be permitted to testify regarding statements made to him by medical practitioners at the facility following the incident.

Counsel for defendants, what's your position on that request?

MS. GOYKADOSH: That should be precluded, your Honor. It's hearsay. I don't believe that plaintiff's counsel provided any legal basis for why he should be allowed to do so. I know that there is a cite to the *Bermudez* case in Mr. Lichtmacher's letter. However, I'm very familiar with that case, and there is nothing in that case that says that a plaintiff can testify as to a doctor's diagnosis, so I do not believe that plaintiff should be permitted to do so.

MR. LICHTMACHER: *Bermudez* -- if I may, your Honor, *Bermudez* was not cited in that letter for that purpose. It was cited about the admissibility of certain records. The reason for plaintiff to testify about what doctors told him is his emotional harms directly after the incident from being led to believe that -- and he still doesn't know -- he might have had two fractured areas: The one in his skull and the other one in his wrist.

So that is -- now, of course, I could not object to a curative instruction that he's not a medical expert, and it was not, you know, followed up or confirmed. You know, that I can't object to. But, on the other hand, his mental state as to what he thought after he got beat up is very much at play and very much part of his damages.

THE COURT: Thank you. So counsel for defendants, can

you respond to that, and let me just frame this somewhat differently in order to elicit a specific response from you. As I understand it, plaintiff is proposing to testify, in essence, that Dr. Doe told him that his arm was broken, speaking broadly. I understand the hearsay concern regarding that statement, the substance of it; namely, that it could be read to be a statement by a person who is not here regarding the truth of the matter; namely, that his arm was broken.

Counsel for plaintiff is asserting that he wants to put in evidence that the plaintiff's understanding that his arm was broken is something that goes to his so-called emotional damages or his emotional distress associated with the incident.

What's your view given that understanding of the purpose for which the statement is presented?

MS. GOYKADOSH: I mean, your Honor, I think it's still a way to circumvent this hearsay rule. What I understand is similar to what your Honor said, he's saying "Dr. Doe told me my arm was broken, therefore, this somehow intensified or amplified my emotional injuries."

I am not really sure I'm seeing the correlation between those two things there. He can testify that he went to the hospital. He will testify that he received x-rays. But then the statements from the doctors and how those play with his emotional injuries is not clear to me.

And I also just note that if he is going to say the

doctors told him X or the doctors told him Y, then we will necessarily be impeaching him with his own medical records which do say for the most part no fracture, no fracture, no fracture.

So, again, I don't think that a statement by the doctor necessarily plays with plaintiff's emotional injuries. I think it's just a way to circumvent the hearsay rule.

THE COURT: Thank you.

So, Counsel, let me ask counsel for defendants to respond to this. I understand that plaintiff wants to put in this statement to go to the plaintiff's emotional state, and I accept that his understanding of his physical state could affect his psychological response to the situation. If he understood that his arm was broken, he might have been more anxious or scared, for example. So I understand at the same time the concern that it will be very difficult for me to unravel the improper use of the statement as improper hearsay testimony regarding the substance of the statement from the proposed testimony.

So, Counsel, I'm considering a ruling in which I would exclude the testimony. I understand that the proposed statement by the plaintiff that a doctor told him X about his physical condition is a hearsay statement to the extent that it is offered in evidence to prove the truth of the matter asserted in the statement. And in this case that is a very

important fact for the case.

I also understand that there could be a non-hearsay purpose for this statement, which is what plaintiff is arguing; namely, that it goes to explain the mental state of the hearer, his emotional distress. So I evaluate this under the rubric of Rule 403.

Unfortunately, I do not believe that I can adequately disentangle the two in this case bringing in a statement that the doctor said that he had, for example, a fractured arm. I believe it would be very difficult for me to instruct the jury not to hear that for the truth of the matter. But I'd invite, Counsel, comments from you regarding whether an instruction will be effective to do so, or if instead I could instruct the plaintiff not to provide that testimony but instead to testify to the effect that he understood following his visit at the hospital that his arm was broken without attributing a particular statement to a particular doctor to avoid the, I'll call it, juror confusion that the statement should be taken for the truth of the matter asserted by the doctor.

So, Counsel, let me hear from each of you about your views on each of those proposed alternatives.

Counsel for defendants?

MS. GOYKADOSH: I believe your Honor's second alternative would be fine, just allowing plaintiff to testify, as your Honor said, that he understood his arm to be broken

without attributing that to any of the doctors.

THE COURT: Thank you.

What's your view regarding the effectiveness of a, I'll call it, limiting instruction; namely, that to the effect that the testimony by plaintiff regarding statements made to him by the doctor not to be taken for the truth of the matter asserted, merely to help you understand his state of mind at the time?

MS. GOYKADOSH: I think I agree with your Honor that that would be very confusing for the jury. I don't think a lay jury is going to understand what hearsay is or what it means to take something for the truth of the matter, so I think it might be more effective if the jury was just not offered that testimony, and then we would side-step the need for a limiting instruction.

THE COURT: Thank you.

Counsel for plaintiff, what's your view?

MR. LICHTMACHER: I think it's the wrist, not the arm, but I've got to look at it again to make sure I'm correct about that. Nevertheless, if he is able to say that he understood after his visit to the hospital that his wrist may be broken, I think that would be adequate.

THE COURT: Thank you.

MR. LICHTMACHER: Because the truth of the matter is -- and, if I may, the truth of the matter is, you know, if

he had had extensive follow-up as he should have had, we probably would have had an ultimate determination whether it happened or not. And you can't bring a denial of medical care claim for a problem that may have been there or may not have been there unless they caused an exacerbation of it. So you're effectively -- if we rule too stringently that he can't talk about this, you're leaving the department of corrections in a position where they could deny a lot of people medical treatment, and then they would necessarily have to minimize their own injuries if they should go to trial over what happened to them. So that's kind of a dangerous door to open up. So he should be able to at least say he left the hospital, and after leaving the hospital he was under the impression that there's a substantial chance that his wrist was broken.

THE COURT: Thank you.

MS. GOYKADOSH: Your Honor, just may I briefly respond? Very briefly.

THE COURT: Thank you. Yes, you may.

MS. GOYKADOSH: Two things: The first is to the extent that plaintiff does testify that he understood his wrist to be broken, we just want to clarify that we will be allowed to impeach Mr. McCurdy with any medical records that might indicate that there were no fractures. Is that correct, your Honor?

THE COURT: No. For the reason that you articulated

in your motion in limine; namely, that the medical records at issue contain complicated medical terminology that are beyond the ken of a lay juror. Again, why the parties, particularly defendants, chose not to identify experts to testify as to these matters is something that is a strategic decision that I do not know the basis of, but that's what I was referring to when I said that unfortunately your concern goes both ways. There is no one here who can testify about what any of these medical records means.

MS. GOYKADOSH: I understand, but just to ask for clarification, your Honor, I'm sorry. For the cortical step-off, I do understand that that term is not a term that the jury can hear. However, there are other records, for instance, for the hand, for the shoulder, that do say simply "no fracture," and I think the jury can understand that. So if he says, "My arm is broken," I just want to be sure I can show him the record that says no fracture.

THE COURT: Thank you. I would hear any objection with respect to that, but I think that falls on the other side of the line; namely, a relative simple diagnosis that a lay person can understand.

MS. GOYKADOSH: Thank you, your Honor.

THE COURT: Good. Thank you very much.

Counsel for plaintiff, we will proceed with that approach. Please instruct your client that the testimony

should be consistent with the approach that you just articulated; namely, in essence, that following his visit to the hospital that he understood that ... whatever it is that he understood about his physical condition without asserting the nature of the statement made by the medical practitioner.

I believe that that is a useful proposed solution that addresses the concerns articulated by both sides, and I adopt it and I appreciate the parties' willingness to stipulate to proceed in that way.

So, counsel for defendants, are you prepared to comment on the request that I take judicial notice of the nature of the offense for assaulting a corrections officer? I believe there are two aspects of this: First, the baseline request, a name that I take judicial notice of a particular state statute. And, second, what I understand to be the proposed use of that judicially acknowledged fact, which I understood from plaintiff's comments to have been to permitted argument that the absence of a charge should be viewed by the jury as proof that the incident did not occur.

Counsel?

MS. GOYKADOSH: Yes, your Honor. Plaintiff should not be permitted to either talk about the fact that assault on a peace officer is a felony or introduce that to the jury. The Court should not take judicial notice of that.

I think the exact words your Honor used at the

beginning of this conference were what plaintiff is trying to imply that non-prosecution means non-occurrence of the fact, I don't think that's the case. I think this links out to the fact that the charges against plaintiff himself are not being admitted in this case.

If an arrest charge is not admitted, quite certainly the fact that someone could have been arrested for something should not be admitted. I think there's two concerns. I think there's a Rule 402 concern and a Rule 403 concern. Under Rule 402, it's not relevant whether or not plaintiff was arrested for the conduct at issue. It simply has no bearing on whether or not any force used was excessive. That's the issue in this case. That's what the jury has to decide. So, number one is that it's not relevant.

Number two is Rule 403, and I think that it will be extremely misleading and confusing to the jury to insinuate to them that because someone was not arrested for a particular offense, that somehow means that the offense did not occur. That's my understanding of what plaintiff's counsel would like to do, and I think that it misleads the jury, it confuses the jury, and it should not be permitted

THE COURT: Thank you.

Counsel for plaintiff?

MR. LICHTMACHER: It's not even close to what I want to do, your Honor.

THE COURT: Thank you. Please.

MR. LICHTMACHER: I had hoped that this would just come in without me giving up part of my strategy, but obviously if the Court is inclined to preclude this, I will explain my reasoning. If the Court is not inclined to preclude it, I would not, and would save it for trial.

THE COURT: I would benefit from a proffer in order to evaluate the application.

MR. LICHTMACHER: I will not benefit by it, but I will give it.

There's been testimony that there was no investigation into this incident. Now, if the DA is contacted, there would be an investigation into this incident. And if there's an investigation into this incident, certain things might come to light. For instance, extensive disciplinary history of one of the defendants, overwhelming disciplinary history for the use of excessive force and ignoring it by people around her. That kind of information would have come out. Additional people would have been interviewed if there was a DA's investigation.

Now, Officer Mitchell had been involved with the prosecution of an inmate from trial, and I'm sure -- from jail, excuse me. I'm sure they'll be able to tell you that there was cooperation necessary with the DA, and it's one thing to maybe be less than totally forthright internally with the department of corrections, but it's quite another thing to not be

forthright with a district attorney coming in to do an investigation. That was the purpose for which I wish to admit this, your Honor.

The jury can be told that they are not to infer anything by the fact that Mr. McCurdy was not prosecuted for allegedly punching a corrections officer, a peace officer, would be deemed under the law. However, where there is another motivation, I think the probative value far outweighs the prejudice to the defendants by this coming in, particularly in light of the fact that we will never say, hey, this shows that it never happened. I will not say that. I'm not intending to. You know, if Mr. McCurdy does, I would be shocked, but I will try to inform him not to do that. However, for the reason I just stated, there is substantial reason behind letting this in and allowing me to explore it.

THE COURT: Thank you.

Can I ask counsel about what I will describe as the inference that you just suggested might be drawn from this evidence? You've just described a number of possible consequences of a referral to the DA's office which correlates, as I understand it, in your view, to lack of evidence, I'll call it, recordkeeping in connection with the incident.

How would all of those facts come before the jury in order to draw the picture that you're describing? Those are things that may be known to you from your lengthy practice, but

there is no witness on our list that, as I understand it, is prepared to speak to what happens in a district attorney's office examination, @investigation or what I'll call it as an expert matter what would have or would have happened in their opinion in the event that such a reference had been made here.

So, I understand the inference that you suggest, but it's not apparent to me what the factual basis would be for the jury to draw it based on the evidence that is outlined in the joint pretrial order.

MR. LICHTMACHER: Well, the witnesses who we have can be questioned about whether they've ever been involved with district attorney investigations into events that transpired in the prison. @It can be inquired into them. They have to cite supporting depositions for criminal documents under penalty of perjury. I believe it's a misdemeanor to lie in a supporting deposition. So that I think is enough, you know, and Officer Mitchell at least has been involved in such prosecution, I believe, for a drug arrest in a prison. So I should be able to ask: Did you have to sign a supporting deposition? Did you understand it was under penalty of perjury? There is no analogous document within a DOC investigation which he actually testified didn't take place other than generating a use of force report after the incident.

So those are the reasons I'd like to do it and that's the evidence I'd like to present. It would have been easier if

I didn't have to explain to the defendants, your Honor, but nevertheless, I don't think the prejudice outweighs the probative value of that, and the jury should be able to look at this and say, hey, maybe this guy was unable -- both of these people were unable unwilling to lie to a DA and invite investigation into what was happening at the prison when no one was looking into it barely at all internally.

So it seems to me to be a very legitimate course of inquiry, and that's the entire purpose of it. Not to say the fact that he wasn't prosecuted means it didn't happen. Just to say that they didn't want to be looked at and have to generate documents under penalty of perjury and that's all. And I will completely avoid saying, hey, this proves it didn't happen, they didn't prosecute it.

THE COURT: Thank you. Counsel, let me do this: I understand a panel is ready to come up. I'm asking that they be directed to come up.

Counsel, I will hear further argument on this and will rule on it. I'd like to use the jury's time and want to allow the parties and their counsel to stretch their legs before the venire arrives. They will be hear in about five minutes, I expect.

So, Counsel, at this point I will tell you that I will take up this issue with later argument, but I'd like to bring up the jury now. I'd ask that you not reference this theory or

argument during opening arguments as a provisional approach to this issue at this time.

Good. So I'll see you back here very shortly, Counsel. I don't want to leave the jury waiting. So, please, if you need to stretch your legs, do so quickly and then come back to counsel's table.

I'm going to step down briefly as we await their arrival. Good.

MR. LICHTMACHER: One more thing, your Honor. Would you like me to try calling the jail again?

THE COURT: Thank you. I will ask someone from my staff to reach out to the jail during this break. If you have the opportunity to do so as well, that can only, I expect, be beneficial to hear from multiple people. But I will ask somebody from my staff to reach out to them.

MR. LICHTMACHER: I'm now on a first-name basis with them, your Honor, I've called so many times, but I will try again.

THE COURT: Good. So I will see you back here very shortly. Don't forget, Counsel, with respect to the practice, we will be using the struck panel method. Each side gets three peremptory challenges which you will exercise simultaneously. We will be putting 14 in the box.

MR. LICHTMACHER: Simultaneously, your Honor?

THE COURT: Yes, that's what I described earlier and

it's what's included in the written paper that I gave you at the final pretrial conference. I will aim for a jury of eight, although as that paper suggests, I reserve my discretion whether to impanel a larger jury if any peremptories overlap or are waived.

Good. Let's take a short break. Please come back after you are finished with the process of stretching your legs. Thank you. I'll be back shortly.

(Recess)

MS. GOYKADOSH: Your Honor, I have the demonstratives and I have them marked.

THE COURT: Wait for Mr. Lichtmacher to return.

MS. GOYKADOSH: OK.

(Jury venire present)

(Continued on next page)

(A jury of 8 was impaneled and sworn)

THE COURT: Mr. Lee, bring in the jury.

(Jury present)

THE COURT: Thank you, Counsel. You can be seated.

Thank you very much, members of the jury. This case is now officially on trial. I would like to say a few words to you all about the process that we will be using as we go through the trial and to describe some rules that will govern your conduct -- yours and mine and the parties throughout the course of the case.

So, first, to begin with, you are all here to administer justice in this case according to the law and to the evidence. You are to perform that task with complete fairness and impartiality and without bias, prejudice or sympathy for or against the plaintiff or the defendants.

Now, I'd like to explain the jobs that we're going to be doing throughout the course of the trial -- your job and my job.

I'm going to describe and decide which rules of law apply to the case. I'm going to decide that by making legal rulings during the presentation of the evidence, and also, as I've told you, in giving the final instructions to you after all of the evidence has been presented.

So, in order for me to do my job, I may have to interrupt the proceedings from time to time to confer with the

attorneys about the rules of law that should apply here. And as I mentioned earlier, sometimes we will do that up here out of your hearing. Some of these conferences may take more time than others. So as a convenience to you where I believe that may be the case, I expect that I will excuse you from the courtroom so that you can spend that time in the jury room. I'm going to try to avoid that kind of interruption as much as possible, but if they do occur, please be as patient as you can. They're important in order to ensure the fairness of the trial, and they often have the effect of having the trial proceed faster.

Now, while I will decide the law that applies to the case, it is you, ladies and gentlemen of the jury, who are going to be the deciders of, the triers of, the facts in this case. It is you who will weigh the evidence that's presented by the parties in the case and decide whether the plaintiff has proven by a preponderance of the evidence that the defendants are liable to the plaintiff. You must pay close attention to all of the evidence that comes into the trial, and you must base your decision solely upon the basis of the evidence that is introduced during the course of the trial and my instructions regarding the law. So I say that you have to make your decisions based on the evidence. What then is evidence?

Evidence consists only of the testimony of witnesses, documents and other things that are admitted into evidence or

any facts that the parties agree to or stipulate to or that I may instruct you to find. Now some of you may have heard the terms circumstantial evidence or direct evidence, so let me just say a few words about each of those types of evidence.

Direct evidence is direct proof of a fact such as the testimony of an eye witness. Circumstantial evidence, on the other hand, is proof of facts from which you may infer or conclude that some other facts exist. Now, the words "to infer" or the term "to draw an inference" means to find that one fact exists from proof of another fact. An inference is only to be drawn if it is logical and reasonable to do so and not by speculation or guesswork.

Now, in deciding whether to draw an inference, you must look at and consider all of the facts in light of reason, common sense, and your experience. Whether a given inference is or is not to be drawn is entirely a matter for you, the jury, to decide. Circumstantial evidence does not necessarily prove less than direct evidence, nor does it necessarily prove more.

So, let me give you an example to help you think about the difference between direct and circumstantial evidence. Assume that when you came into the courthouse this morning, the sun was shining, and it was a nice day outdoors. Also assume that the courtroom blinds, as they are now, were drawn, and you could not look outside. Assume further that as you're sitting

here, somebody walks in the courtroom with an umbrella that was dripping wet, and then a few moments later someone else walks in with a raincoat that was also dripping wet.

Now, because you could not look outside of the courtroom and could not see whether it was raining, you would have no direct evidence of the fact that it was raining. But, on the combination of the facts that I've asked you to assume; that is, the wet umbrella and the wet raincoat, it would be logical and reasonable for you to conclude that it was raining. That's all there is to circumstantial evidence. You infer on the basis of your reason, experience and common sense from one established fact the existence or non-existence of some other fact.

Now I will give you more instructions on this as well as other matters at the end of trial, but keep in mind that you are to consider all of the evidence that's introduced at trial. Now, certain things, however, are not evidence and must not be considered by you.

The following is a list of things that are not evidence: First, statements and questions by the lawyers are not evidence, neither are any statements that I may make or any questions that I may ask of a witness, and arguments by the parties are not evidence.

Second, objections to evidence or objections to questions are not evidence. You should know the lawyers have

an obligation to make an objection when they believe that evidence is being introduced that is improper under the rules of evidence. You should not be influenced by an objection or by my rulings on them. If an objection is sustained, then you should ignore the question and any answer that may be given. I will either say "objection sustained" or oftentimes you will hear me say to the counsel that I will ask them to rephrase the question. If I do one of those things, then you should ignore the question and any answer that may have been given.

If the objection is overruled, then you should treat the answer like any other answer that may be given during the course of trial. If I instruct you that some item of evidence is received for some limited purpose, you must follow that instruction.

Third, testimony that I have excluded or that I tell you to disregard is not evidence and must not be considered.

Fourth, anything that you may have seen or heard outside of the courtroom is not evidence and must be disregarded. You are to decide the case based solely on the evidence that is presented here in this courtroom before you.

Now, in deciding the facts of the case, you're going to have to decide about the credibility of the witnesses; that is, how truthful and believable they are. There is no magic formula to evaluate evidence. For now just suffice it to say that each of you bring into this courtroom all of the

experience and the background of each of your lives. Do not leave your common sense outside of the courtroom. The same types of tests that each of you use in your everyday dealings are the tests that you should use and apply them in deciding how much weight, if any, that you wish to give to the evidence that's introduced in the case.

The law does not require you to accept all of the evidence that's introduced at trial, and in determining what evidence to accept, you must make your own evaluation of the testimony from each of the witnesses and from the exhibits that are accepted into evidence.

It's very important, essential, however, that you keep an open mind until you have heard all of the evidence in the case. That's because a case can be presented only step by step, witness by witness. And as all of you know from your own personal lives and experience, you can hear one person give her account of an experience and think that it sounds very impressive, perhaps even compelling; and then upon hearing another person's version of the same event or even in this context the same person being cross-examined about the same event, things may seem very different. In other words, there may be another side to any witness's story. So you should use your common sense and your good judgment, and you must evaluate each witness's testimony based on all of the circumstances.

Again, I can't emphasize too much how important it is

that you keep an open mind until the trial is over. You should not reach any conclusions about the case until all of the evidence has been presented to you.

It's very important for all of you to remember that this is, as I've told you already, a civil case. You may have heard of the beyond-a-reasonable-doubt standard that applies in criminal cases. That requirement does not apply in a civil case, and you should put it entirely out of your mind. In civil cases, the burden is different, and it's called proof by a preponderance of the evidence. The plaintiff has the burden of proving the elements of his claim by a preponderance of the evidence. This means that the plaintiff has to prove that the facts are more likely true than not true. A preponderance of the evidence means a greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. This means that the plaintiff has to present evidence that considered in light of all of the facts leads you to believe that what the plaintiff claims is more likely true than not.

To put it differently: Imagining you are reviewing one of the plaintiff's claims against a defendant. If you are to put the evidence that supported the plaintiff's claims on one side of a scale and the evidence that supports the defendant's on the other side of the scale, the plaintiff would have to make the scales tip somewhat in favor of his claims in

order to prove his claims by a preponderance of the evidence. If the plaintiff fails to do that, he has not met his burden, and your verdict on the plaintiff's claims must be for the relevant defendant. I will instruct you further on the burden of proof after all of the evidence has been received.

Now, I'm going to give you detailed instructions about the law that applies here after the close of evidence. Those instructions will be the controlling statement of the law in this case, and they will guide your deliberations. Still, I'm going to tell you now the basic elements of the principal legal claims in this case. I hope that this brief overview of the law will help you to frame the evidence that you will see and hear over the next few days.

This is a case about whether defendants Captain Cheryl Bell and Corrections Officer Gerald Mitchell used excessive force against the plaintiff on February 19, 2015 during a search at Rikers Island. To prevail on his excessive force claim, the plaintiff must prove by a preponderance of the evidence that the defendants' use of force was excessive "in light of the facts and circumstances confronting them." The amount of force used, if any, must be judged from the perspective of a reasonable officer on the scene rather than with the 20/20 vision of hindsight in the calm of the courtroom. In addition, you're not to determine the least amount of force that could have been used, but, rather, if the

force that was actually used was excessive.

Finally, you must account for legitimate interests that stem from defendants' "need to manage the facility in which the plaintiff is detained," appropriately deferring to "policies and practices that in the judgment" of jail officials "are needed to preserve internal order and discipline and to maintain institutional security."

Finally, let me remind you about certain rules and principles governing your conduct as jurors in this case. First, you must not talk to each other about the case or about anyone who has anything to do with it until the end of the case when you go to the jury room to decide on your verdict. The reason for this requirement is very simple. It's the one I've already described to you; namely, that you must not reach any conclusions on the claims or defenses until all of the evidence is in. As I've said, I want you to keep an open mind until you start your deliberations at the end of the case.

Second, do not communicate with anyone else about the case or with anyone who has anything to do with it until the trial is over and you have been discharged by me as jurors. Now, when I say don't communicate with anyone else, anyone else includes your family members and your friends. When I say don't communicate, I also mean don't communicate via Facebook, Twitter, blogs, etc. You can tell your family members and friends that you are a juror in a civil case, but please don't

tell them anything else about the case until you've been discharged by me. If you'd like, you can tell them that you've been ordered by the judge not to discuss the case. So I'm ordering you not to discuss the case.

Third, don't let anyone talk to you about the case or anyone involved in the case or anyone who has anything to do with the case. If any person should attempt to communicate with you about the case at any time during the trial, either inside or outside of the courthouse, please report that immediately either to Mr. Lee or to my clerk, Ms. Nelson, and to no one else. And when I say to no one else, I mean that you should not tell anyone, including your fellow jurors.

Now, to minimize the probability of any such improper communication, it's important that you go straight to the jury room in the morning and that you remain in the jury room for the duration of the trial day if you can. You should use the bathrooms that are there in the jury room as you've already seen rather than the bathrooms on this or any other floor. And as I think you've already been told, you may not use the cafeteria.

Given our morning and afternoon breaks are going to be short, it's probably best that you remain in the jury room if you can. And I ask that you bring brown-bag lunches to eat in the jury room during our lunch break. As I said earlier today, I'll get coffee for you, I'll get cookies and light

refreshments, but if you want something more substantial, you should bring it with you. That's important to keep our lunch breaks short as they need to be in order for us to stay on schedule.

Fourth, do not do any research or any investigation about the case or about anyone who has anything to do with it on your own. Don't go visit any of the places that may be described during the course of the trial. Don't read or listen to or watch any news reports about the case if there are any. Don't go on the internet or use whatever digital or communication devices it may be that you use to see if you can inform yourselves further about the matter.

That, again, is because your decision in this case must be based solely on the evidence that is presented during the trial. All that you need to know will be presented here in court by the very capable lawyers who are representing each of the parties. Please inform me promptly through either my clerk or Mr. Lee if you become aware of another juror's violation of these instructions.

Also, please let me know if any person that you know happens to come into the courtroom. This is a public trial. This is a public courtroom, so theoretically that could happen. It's important that if somebody you know does come into the courtroom, that you let me know that again through Mr. Lee or my clerk. It's important that if such a person does come into

the courtroom that you not hear from them what may have happened in the courtroom while you were out of the courtroom for the same reason that I've already told you several times; namely, that you all should be making your decisions based on the evidence that's presented here. If you should see a friend or relative come into court, please send me a note through my clerk or Mr. Lee promptly.

Now, last procedural note is this: If you would like to take notes, please let me know. Just raise your hand and Mr. Lee will give you each a notepad on which you can take notes. I'd be happy to let you all take notes. If so, just let Mr. Lee know, and he'll give you a notepad. I'm happy for you to do that. If you do choose to take notes -- you don't need to, but if you do choose to take notes, you should begin writing on the second page of the notepad and write your juror number on the first page of the note pad so we can be sure that only you are looking at your own notes.

If you do take notes, only do so in the notepads that Mr. Lee will give you. Do not take your notes home with you. You should leave them in the jury room during each of our breaks and overnight. You don't have to take notes. If you do take notes, remember that they're just an aid to your recollection. Any notes that you take are for your use only and only are supposed to be used by you to aid your memory. It's your memory that controls. If you do take notes, please

be careful not to get so engrossed in taking the notes that you're not paying attention to the witness and what he or she is saying or to the evidence that's being introduced.

Remember that once you're in your deliberations, if there's a disagreement between one juror's notes and another juror's notes or between one juror's notes and another juror's memory, you can always ask to have the court reporter read back the testimony or to have that portion of testimony sent back to you, because it's the official court transcript that controls, not any particular juror's notes.

During the course of the trial, I expect that exhibits will be introduced into evidence. They will be marked by an exhibit number. If there's an exhibit that you're particularly interested in seeing, you can write down the exhibit number. That said, I expect at this point that I will be sending back to the jury room when you retire to deliberate all of the exhibits that are received into evidence so that you should have them at hand.

So, it's 3:18 now. Let me talk about the order of trial. This trial, as I told you all at the beginning, we're going to begin each day at 9:15 a.m., and we're going to continue until approximately 3:30, including breaks. I expect that the trial will proceed tomorrow. I expect I'm going to end shortly. I expect it may go until the middle of next week.

It's important that you all be on time. If any of you

are late, we will all have to wait because we can't start until all of you are present. And if any one of you is late, then everyone -- the parties, defense counsel, your fellow jurors and I -- all have to wait. And if we do lose even ten or 20 minutes every day, we may not be able to get the trial completed on time. So I ask you to please be here on time tomorrow and subsequent days at 9:00 a.m. I will try to begin us as early as possible after 9:00 when you are all here. But, in any event, I expect that we will begin with testimony no later than 9:15 a.m.

Now, I'd like to just say a few words about how the trial will be conducted and explain what we're going to be doing. At the end of the trial, I'm going to give you more detailed instructions which will control your deliberations, but let me just take a few words to tell you how the trial is going to proceed now.

The first step in the trial will be opening statements. First, the plaintiff's attorney will make an opening statement. The opening statement is simply an outline to help you understand the evidence that the plaintiff expects to be presented. The opening statement is not evidence. Its purpose is only to help you understand what the evidence will be and what the plaintiff will try to prove.

Then the defendant's attorney will make an opening statement. And remember what I've already told you about what

evidence is and what it is not. At that point no evidence will have been presented to you. You will only have heard commentary by the lawyers, which is not evidence.

After opening statements, the plaintiff's attorney will present the plaintiff's evidence. The plaintiff's evidence will consist of the testimony of witnesses as well as documents and exhibits. The plaintiffs will examine those witnesses, and then counsel for defendants will have the opportunity to cross-examine them. In this case the defendants will have some of the same witnesses as the plaintiff. So rather than asking each of those witnesses to come to the stand and to testify twice, what I expect will happen is that the defendants may present their case while the witness has been presented by the plaintiff. And plaintiff would then have the opportunity to cross examine those witnesses on their testimony for the defendants. We are proceeding in that way simply because it's more efficient as a way to present the evidence to all of you.

After the presentation of the evidence is completed, the plaintiff, and then I should say the defendants may then also call witnesses with respect to their case. Where defendants call witnesses in the same way, the plaintiff's counsel will have the opportunity to cross-examine those witnesses and defendant's counsel will have the opportunity to ask any rebuttal or redirect questions of that witness.

Now, after the presentation of evidence by both sides is completed, plaintiff, plaintiff's lawyer, and the defendant's lawyer will deliver their closing arguments to summarize and determine the evidence. Now in the same way that the opening statements are not evidence, closing arguments are not evidence. Following their closing arguments, I will instruct you on the law. Then will retire to determine on your verdict, which must be unanimous and must be based on the evidence presented at trial. Your deliberations will be secret. None of you will be required to explain your verdict to anyone.

So, ladies and gentlemen of the jury, given that it is 3:22 p.m., what I'm going to propose to do now is to adjourn for the day. I'm going to try to have you out of here every day at 3:30. It's almost 3:30. So what I'm going to ask you to do is first to be here tomorrow morning at 9:00 a.m. I am going to remind you of some instructions that I just gave you moments ago. Don't talk about the case to anyone. Do not do any research about the case or anyone that has anything to do with it. And don't communicate with anybody who has anything to do with the case in any way, whether verbally or over the internet or by any other means.

So, please be here tomorrow morning at 9:00 a.m. At that point I expect we will begin with the parties' opening statements. So thank you very much. I'll see you in the

morning.

(Jury not present)

THE COURT: Thank you. You can be seated.

Thank you very much, Counsel. Let's begin, first any issues that either party would like to raise before we begin a discussion of the proposed charges?

Counsel for plaintiff.

MR. LICHTMACHER: There will be one issue, but it's related to the charge and what you just instructed the jury on. And if you agree with me, I will be asking you to do a very tiny curative instruction about that part of the charge. So we could maybe more appropriately discuss it during the charging conference than now, but that is my major issue, your Honor.

THE COURT: Thank you.

So, first, I'd be happy to talk about it in the context of the charge itself. What are you referring to?

MR. LICHTMACHER: Page 18. On page 18 --

THE COURT: Thank you. Good. This is a specific issue in the charge?

MR. LICHTMACHER: It is.

THE COURT: Good.

MR. LICHTMACHER: But it's a very important issue, particularly in light of the fact that you already instructed the jury as to it. And if you do agree with me -- you may not, but I'm hoping that you do. If you do agree with me, I think

you will find it fit to do something curative, your Honor. It's on a small level, but it's relatively important, and I'll be able to show you why in a minute.

THE COURT: Fine. So, Counsel, let's proceed. I have a copy of the September 1 version of the charges. Counsel, who has the first comment? Counsel for plaintiff, what page is your first on what page does your first comment appear?

MR. LICHTMACHER: On page 18. May I remain seated, your Honor? Is that OK?

THE COURT: Yes. So before we proceed, counsel for defendants, what page is your first comment on?

MS. GOYKADOSH: 14, your Honor.

THE COURT: Thank you. Good.

So, counsel for defendants, what is the nature of your comment?

MS. GOYKADOSH: Beginning on page 14 and continuing on page 15 is the first element under color of law. We don't think it's necessary to charge the jury on that. We are not going to be disputing that defendants were acting under color of law.

MR. LICHTMACHER: And plaintiff agrees, your Honor, and regularly it's not done, at least recent trials I've done. Although, your Honor, you do kind of say at the bottom of the page, it does -- I'll withdraw my objection to it. Forgive me.

THE COURT: Thank you. There is no question that the

charges as stated do not require a finding of this. The instruction at the top of page 15 states that this first element of 1983 is satisfied as to both defendants. The request is that I change page 14 of the charge to refer to the following two elements? Is that correct, counsel for defendants?

MS. GOYKADOSH: Yes, your Honor.

THE COURT: Thank you.

You're asking that I say two elements rather than three elements. Then that I delete the section that says "first," and insert "first" in the place where it currently says "second" and "third" -- sorry -- "second" in the place where it currently says "third" on page 14. Is that correct?

MS. GOYKADOSH: Yes, your Honor.

THE COURT: Thank you.

So then you're asking me to remove all of subsection one, and you are asking me to re-number section two as section one, and to rename second element, first element. You are asking that I change the word "second" in the first sentence of that paragraph to "first."

MR. LICHTMACHER: May I be heard on this, your Honor?

THE COURT: Thank you. Give me one moment. I am trying to work through all the changes that are required as a result of this proposed modification. Thank you.

You're also asking that on page 19 of the charge, I

change the reference to third element in the heading to "second element."

You're also asking that I change the second sentence of that paragraph to replace the word "three" with the word "two." And to replace the entire first clause -- or to delete the entire first clause so that the first element as described there would be what is currently the second element, and that I replace the reference to "three" and the following clause with a number "two."

MS. GOYKADOSH: Yes, your Honor.

(Continued on next page)

THE COURT: Thank you.

MS. GOYKADOSH: I think there's one more thing, your Honor. On page 20, it says, "If you find that the plaintiff has proven all three elements." That should probably be changed to two as well.

THE COURT: Thank you.

With respect to that reference, I believe that reference may be to the three elements of causation, which are referenced immediately before that -- namely, the 1, 2, 3 immediately before that text. I could delete that sentence in its entirety to the extent that it's unclear whether that's a reference to the now two elements of the 1983 claim as requested by defendants or to the three things that must be proven in order to demonstrate proximate causation. What's your preference?

MS. GOYKADOSH: I apologize, your Honor. That was my mistake. I think it's fine the way it is.

THE COURT: Thank you.

MR. LICHTMACHER: May I be heard on this, your Honor?

THE COURT: Yes.

MR. LICHTMACHER: The proposal won't work lest you also change page 14, at the top, "Plaintiff claims that on February 19," etc. Plaintiff brings the claim pursuant to Section 1983 of Title 42 of the United States Code. Section 1983, and it says it "provides a remedy for individuals who

have been deprived of their federal constitutional rights under color of state law." It goes on to mention "color of state law" again, farther down on the page. I think it should be left as is. I don't think there's any problem with it. And you did -- and it was my error -- you did say that element has been proved, and in virtually all the many dozens of these cases that I've tried, it's been done exactly this way, where it is explained as part of it and it says it's not contested. And I think it's better to leave it alone.

THE COURT: Thank you.

Counsel for defendants?

MS. GOYKADOSH: Your Honor, it's just extra words about an issue that the jury does not need to decide, so I don't really think there's any additional benefit of having that here. The jury is not deciding color of law. Your Honor is instructing them that they're not deciding color of law. So it's unclear why they need to even be instructed on that.

THE COURT: Thank you.

Counsel for plaintiff, I'm, frankly, largely indifferent. Would it be legally inaccurate to make the changes that I've just described? I do not propose, I would not propose, and I don't believe defendants have proposed, that we delete the second sentence of the first paragraph under the 1983 overview. That's just a description of the relevant law. The elements are described in the subsequent sections. So I

don't think that defendants' change is necessary. I understand their view that it would be less verbiage regarding an unnecessary issue, and so I'm willing to accommodate it. Counsel for plaintiff, any concern that the charge as proposed to be reframed would be legally inaccurate after deleting those references to the under color of state law requirement?

MR. LICHTMACHER: Are you asking me?

THE COURT: Yes.

MR. LICHTMACHER: Yeah, I think it would be inaccurate, and if somebody was to hear this, even unintentionally, you know -- I understand it doesn't have to be a research project -- they'd think something was missing. It does concern me, considering what little burden it is for it to be read there. And you have a very concise charge here. This is not a 65-page charge. It's fairly tiny. No reason not to leave it in. It's the way it's always done, and it should be understood the way it is.

THE COURT: Thank you.

Counsel for defendants, do you have a concern that the charge as written is legally inaccurate?

MS. GOYKADOSH: Inaccurate, your Honor?

THE COURT: Yes.

MS. GOYKADOSH: No.

THE COURT: Fine. So I'll leave it as is. Counsel for plaintiff objects to the deletion. I understand that the

purpose of the change is to reduce the verbiage in front of the jury, but I believe that the charge is accurate and it clearly states that this is an element that is not disputed.

Good. So who has the next change?

Counsel for plaintiff, I understand your next change is on page 18.

Counsel for the defendants, do you have a change before page 18?

MS. GOYKADOSH: Yes, your Honor. Beginning on page 15, and continuing on page 16, the first sentence of Part II, Second Element, reads: "To establish the second element of the Section 1983 claim, plaintiff must show that he was intentionally," and then in bold brackets, it says, "or recklessly." We would argue that the "or recklessly" language should be removed globally from the charge. There's no allegation here that the defendants acted recklessly; the allegation is that they acted intentionally. So I believe that it is confusing to include the "or recklessly" language here.

THE COURT: Thank you. I bracketed it in that way because I understood that the allegation was not that the conduct was reckless but rather that it was intentional. I bracketed and bolded it to flag precisely that issue.

Counsel for plaintiff?

MR. LICHTMACHER: If something is done severely recklessly, it violates 1983. You know, also, you can be

reckless in terms of, you know, inflicting degree of harms you didn't mean to inflict, but you can also have intentionally thrown a punch. If you throw a punch, you don't hurt somebody very badly but you recklessly do, then the person has acted intentionally and recklessly. So I think both words belong in there.

THE COURT: Thank you.

To be clear, the conversation that we're engaged in now relates to the commission of the alleged acts, in particular here with respect to whether or not the acts taken by the officers -- that is, the corrections officer and Captain Bell -- as alleged, were undertaken intentionally or recklessly. I understood that the allegation was that they physically assaulted him, not that they accidentally let the jail door slam on his hand. So I understand the question presented here to relate to that, not the consequences, I'll call it, of their actions or their, I'll call it -- should not call it *mens rea*, but I'll say the objective/subjective element of a 1983 case in this context.

So is there a basis to conclude that either of the officers' conduct as alleged here was reckless -- in other words, their acts were reckless?

MR. LICHTMACHER: The acts of throwing punches and kicks were not reckless; they were intentional. So we do concede that the degree of injury they might have inflicted

might have been reckless.

THE COURT: Understood. Thank you.

So I agree with the comment by defendants that here, based on the facts presented, that the references to recklessness are not warranted based on the proffers that I've heard regarding the nature of the conduct of the defendants, so I will accept those changes on pages 15 and 16 and delete the bracketed language regarding reckless conduct.

Where is your next change, counsel for defendants?

MS. GOYKADOSH: It's not a change per se. It's a language that I would like added to the excessive force charge. So I guess it would fall within page 16 to the very, very top of 19. So I don't know if plaintiff's counsel's comments fall before that. It's just language that I want.

THE COURT: Thank you.

I'm happy to take up plaintiff's comment now then, and then please raise the proposed addition, counsel for defendants.

Counsel for plaintiff? We're on page 18.

MR. LICHTMACHER: Certainly. On 18, nine lines down. Here's the problem. The sentence that begins with, "You must also account for the legitimate interests that stemmed from defendants' need to manage the facility in which the plaintiff was detained," and here it goes, "appropriately, deferring to policies and practices that, in the judgment of jail officials,

are needed to preserve internal order and discipline and to maintain institutional security." From "appropriately" to "institutional security" should be struck, and here's why. Because at that point in time, it was proven in the Nuñez doctrine that policies that were being used and employed, the de facto policies at Rikers Island, were in fact illegal, and the city had to acquiesce to that. So under these rules, they could present evidence of the policies that allowed things to happen that were clearly deemed illegal under Nuñez. I know you've looked at Nuñez recently, your Honor. It's clear.

So this is just an inaccurate statement as to 1983. And thinking about it a little further, if in fact a government agency uses an illegal policy and violates people's rights pursuant to that policy, the officer should not be able to get off just because they act in conformity with the illegal policy. That's why those sentences have to be changed. Or those lines. Excuse me.

MS. GOYKADOSH: May I respond, your Honor.

THE COURT: Yes.

MS. GOYKADOSH: That sentence is a direct quotation from *Kingsley*, which is from the Supreme Court, and the citation is 135 S. Ct. 2473, and it's quoting *Bell v. Wolfish*, which is another Supreme Court case, 441 U.S. 520, 540. It's a 1979 case.

And that language was also included in the proposed

charge on page 17, which plaintiff did not object to at that time. That language is not an inaccurate statement of 1983 law. It is 1983 law.

And I'm also not certain what policies Mr. Lichtmacher is currently referring to.

So we believe that that language, which is Supreme Court law, should stay in the charge.

THE COURT: Thank you.

Counsel for plaintiff?

MR. LICHTMACHER: *Bell v. Wolfish* has nothing to do with this and wasn't judging the policies of Rikers Island -- or, excuse me, DOC in general, which were found to be illegal, period. That's not contested. It can't be, because they were. And the city signed off on that. So therefore, pursuant to this, because this is talking specifically about a Rikers incident, and we're talking about policies and practices that were illegal, if these people didn't violate, you know, illegal policies, then the standard for my client's rights have been lowered, and there's nowhere that allows that to happen. You're allowed to increase someone's rights, in the state or the city, but they're not allowed to lower the degree of rights pursuant to the Constitution.

Now the Supreme Court was not ruling on what specifically was going on in Rikers Island. They're completely disparate cases, the cases that were cited. And *Bell* is

ancient. I know it's still good law, I know it's important precedent, but it's ancient.

More importantly, we should be looking at *Graham v. Connor* or looking at *Monell* and its progeny, you know, but when you have a policy that's been declared and signed off and admitted to be illegal and you say they were acting according to the policy, you know, and it's allowable to do that, then you're saying they're allowed to violate the law, violate the Fourth Amendment, Fourteenth Amendment.

THE COURT: Thank you.

Let me ask for further argument on this point. I'd like to ask that we address it in a number of steps.

First, counsel for plaintiff, I appreciate that the argument here is that this language should not be held to apply here because the policies and practices at issue were determined to have been violations of the Constitution and that you assert that that is the conclusion of the Nuñez consent decree. I'll invite comment on that issue momentarily -- namely, whether the city agreed, in the consent decree in Nuñez, that the policies that they were agreeing to improve through the processes described in Nuñez should be read to imply that their prior practices were constitutionally infirm. So I will take up that issue separately.

With respect to the arguments by counsel for defendants, however, that the language here is from *Kingsley*,

is there any other argument why this language is inappropriately included in the charge? Counsel for plaintiff?

MR. LICHTMACHER: No, your Honor.

THE COURT: Thank you.

Good. So let's take up the specific issue -- namely, the argument that because of Nuñez, the policies and practices at issue here are proven to have been constitutionally infirm and therefore that deference to them is inappropriate.

I have looked at the Nuñez consent decree. I invite comment by the defendants regarding whether defendants accept that that consent decree should be read or construed as a concession by the city that their pre-existing policies were uniformly constitutionally infirm.

Counsel for defendants?

MS. GOYKADOSH: Your Honor, I apologize. I have not reviewed Nuñez in advance of this charging conference. But I do not see how that consent decree should be a reason to extract this language from the charge. What we're talking about here is whether this single incident of excessive force on February 19, 2015 violated Mr. McCurdy's rights. So I don't see how language from the Supreme Court would somehow fall into second place based on a consent decree in the Nuñez case. Again, I would need an opportunity to review that. I did not review it in advance of today, so I apologize for that, but I do not believe that Nuñez would be a reason not to include this

language. And again, this language was in the statement of law that the Court gave the parties. Mr. Lichtmacher did not object to it at that time.

THE COURT: Sorry. That the parties gave the Court.

MS. GOYKADOSH: I apologize. That the parties gave the Court. And it was also in the proposed requests to charge that the parties gave the Court, and Mr. Lichtmacher did not object, again, at that time. So this is news to me that this is being objected to today. I don't understand why it's being objected to, and I think it should remain because it's a direct quote from *Kingsley*.

MR. LICHTMACHER: The reason that I -- if I may quote from Nuñez, your Honor. I can draw your attention right to one of the relevant sections. And, you know, I studied Nuñez in preparation for this. I understand your ruling about Nuñez so far, but I think there may be a time it comes in. And if I may, turning to page 5 of Nuñez, which is my document 16, I believe.

Yes. This is signed off on by the City of New York. This is part of it. No. 1. It's under the IV, No. 1:

"Within 30 days of the effective date, in consultation with the monitor, the Department," and they're referring to the Department of Corrections, "shall develop, adopt, and implement a new comprehensive use of force policy with particular emphasis on permissible and impermissible uses of force.

"New Uses of Force Directive. The new use of force directive shall be subject to the approval of the monitor.

"No. 2. The new use of force directive shall be written and organized in a manner that is clear and capable of being readily understood by staff."

And moving down to A of 3, a statement at the beginning of the new use of force directive sets forth the following general principles: "The force shall always be the minimum amount necessary and must be proportional to the resistance or threat encountered. The use of excessive and unnecessary force is expressly prohibited." And it goes on.

And the problem is, in the entire Nuñez finding, agreed upon by the city and signed off on by the city, they were having a horrible problem with excessive force being used. And Nuñez, which started as a document just about force used against younger inmates, was expanded in page 2 to include using force against all inmates. They expanded the group covered by it. I believe it's page 2. I studied it pretty hard at one point. And it's clear that if your Honor allows them to act within the -- yeah, it's page 2, No. 3.

It's clear that if they're allowed to say, hey, we acted within the policy of the Department of Corrections, they could have done a lot of illegal things, then suddenly that becomes justifiable under the Fourth and Fourteenth Amendment, and that's not the case. The Fourth and Fourteenth Amendment,

they're rules here, your Honor.

So with all due respect to my adversary, their argument is just legally wrong in this circumstance, because of Nuñez and because of what was going on in the Department of Corrections, which is also why we're here.

THE COURT: Thank you.

Counsel for defendants, do you want to present any additional argument with respect to the Nuñez document? This is clearly germane to questions related to the ultimate admissibility or use of this decree in the *Monell* stage of the case, and a principal question, to the extent that I can focus you on it, is your view regarding whether the fact that the city agreed to improve its standards can be read to mean that their prior standards were agreed by the city to have been constitutionally infirm. Counsel, did the city agree that the standards applied by the city prior to the implementation of the Nuñez decree were constitutionally infirm? Is that what the Nuñez consent decree stands for?

MS. GOYKADOSH: Your Honor, may I have a moment to confer with my supervisor, please.

THE COURT: Thank you. Please take your time.

(Pause)

(Discussion off the record)

THE COURT: Let me just point out a couple of things that may be relevant to this conversation.

First, the consent decree contains only two recitals regarding why it is that the consent decree was entered into. Those are the recitals that begin on the bottom of page 1 and that carry over to the top of page 2. I have not seen, in reviewing the entirety of the consent decree, a statement by the city acknowledging that they agree that their use of force policy was unconstitutional previously, and I note that the only recitals that explain the instigation for this consent decree appeared to relate to the findings by the U.S. Attorney's Office with respect to unnecessary use of force against minors, understanding that the consent decree itself then applies to a broader group.

What I'm looking for is whether and to what extent the agreement by the city to improve their practices should be read perforce as an acceptance that their prior conduct was universally inconsistent with constitutional standards. The context in which such issues come up before the Court frequently come up in the context of Rule 407. This is not a Rule 407 issue. But Rule 407 talks about the question as to whether or not subsequent remedial efforts can be introduced for the purpose of proving that prior conduct was improper. I'm not making a conclusion that that rule applies here, but it is certainly an analytical framework that I consider in evaluating whether or not an agreement to make future changes to improve things means necessarily that there is an agreement

that conditions pre-existing the agreement were improper.

MR. LICHTMACHER: Your Honor, if I may respond to that.

THE COURT: Yes.

MR. LICHTMACHER: Certainly subsequent remedial measures under certain circumstances aren't allowed. I'm not seeking to use one. But the problem is, if this policy is then allowed to be found as the basis for Fourteenth Amendment liability, then I'd almost have to.

And in terms of Nuñez acknowledging that there's a problem, the entirety of the document is about that there's a problem, that the policies have led to these. It's taken as a whole; it's the only way to look at it -- the US government, you know, telling, and New York City agreeing, yes, we have a problem, we have to change our policies. All these changes are about policy changes, and they're listed ad nauseam in Nuñez, and they're all relevant to the things we're here about, and I am concerned, concerned, that somebody gets on the stand and says, well, the policy, we're allowed to do this, we're allowed to do that. You know, I mean, not picking on anybody, but if in Alabama, somebody says, you know, you can punch an inmate until he stops moving, or stops breathing, and somebody acts in accordance with that, doesn't mean they didn't violate the Eighth Amendment, your Honor. And that's the problem here. I mean, this entire document is about your policy is bad, you

have to change it, you've got a de facto policy, and it's an enormous document and agreement and hopefully effected a lot of good change. And that's why that sentence is so disturbing to me.

THE COURT: Thank you. Understood.

It may be that separate and apart from the question of whether or not Nuñez stands for the broad principle that you've described, it may be that the Supreme Court freights the word appropriately with much meaning; in other words, that one must not give full deference to the policies and practices but that one must give appropriate deference to those policies and practices.

In any event, I look forward to hearing more from the parties following our short break. I'll be back in about five minutes. Thank you, all.

THE DEPUTY CLERK: All rise.

(Recess)

(In open court)

THE COURT: Thank you. Please be seated.

So we're back on the record after a short recess.

Counsel, any further argument with respect to the proposed deletion of the language in the charge from *Kingsley*? Counsel for defendants?

MR. SIDDIQI: Yes, your Honor.

So thank you for allowing defendants a short break.

During that break I was able to speak to one of the attorneys who was assigned to help draft the Nuñez consent decree. It's our position that in the Nuñez consent decree, if you go to XXII, which appears on page 58 of the document -- if you're looking at the enumeration of the docket sheet, it's page 60.

THE COURT: Thank you.

MR. SIDDIQI: Your Honor, it would be our position that that section, stipulation pursuant to the PLRA, 18 U.S.C. Section 3626, that it expressly states that the prospective relief arising from Nuñez is "narrowly drawn," "extends no further than is necessary to correct the violations of federal rights as alleged by the United States and the plaintiff class." That section also expressly notes that, "This section shall not be admissible against defendants in any court for any purpose." It's our position that the Nuñez decree does not contain any admission that the policies or practices previous to that decree were de facto illegal or unconstitutional.

So I hope that answers the question that the Court had before we took the break.

THE COURT: Good. Thank you very much. That's helpful.

Counsel for defendants, can I ask, just as a matter of fact, what the testimony, if any, would be by defendants that might relate to this section of the charge. Counsel for plaintiff has used one hypothetical in order to illustrate the

nature of the concern. What can you proffer regarding any expected testimony regarding the policies or practices that the officers here were following, if any, that would come in as part of the testimony? Counsel hypothesized a policy that was used which permitted the excessive use of force and posited that if such a policy were in place, then this language would undermine the constitutional protections afforded to pretrial detainees. Counsel, in order to help me understand how this might apply in this case, can you tell me or make a proffer regarding the testimony that you anticipate that might relate to this element of the charge.

MR. SIDDIQI: Certainly, your Honor.

The testimony that's going to come out with regards to any policy or practice is that before the incident involving the plaintiff, there was a slashing in the commissary of AMKC near the housing area and that as a matter of policy, after a slashing, the inmates are sent back to their cells for an institutional search so that the corrections staff can look for the weapon in question and can also look for any other related contraband. As a part of that institutional search, plaintiff was sent back to his cell. Plaintiff was instructed to comply with a strip search to advance that institutional search. Rather than complying with the strip search, plaintiff threw his T-shirt at Officer Mitchell's face, then punched Officer Mitchell in the face. Officer Mitchell at that time, to regain

control of the situation, punched plaintiff back. Officer Mitchell was unable at that time to use his OC chemical spray because he was too close to the plaintiff and it would not be effective. After the punch, after the more than one punch --

THE COURT: Just to focus you, do you expect that there will be testimony regarding a policy that the officer was using or applying in restraining Mr. McCurdy? Do you anticipate that there will be testimony regarding a policy regarding the use of force that was applied in restraining Mr. McCurdy in the incident?

MR. SIDDIQI: Your Honor, any testimony that would come out would be that the force used by the officers was consistent with their training given by Department of Correction.

THE COURT: Thank you.

And what would you anticipate the testimony regarding that to be?

MR. SIDDIQI: At that time that an officer is struck by an inmate, he is allowed to use responsive and proportional force in response to regain control of the situation.

MR. LICHTMACHER: Your Honor, I have no objection to that sentence, "proportional." I have no objection to that. I have objection to this --

THE COURT: I'm sorry. Just to be clear, as I understand the proffer, the testimony would be that the

training that the officer received was that they were permitted to use proportional force, is that correct, counsel?

MR. SIDDIQI: Yes, your Honor. I believe that the officers will testify that the force they used was reasonable to maintain order and that they used the minimal force necessary to regain control of the situation.

THE COURT: Thank you.

So to be clear, regarding the training that they received or the policy or practice that informed their conduct, do you anticipate that the testimony will be as you described just now, that the policy that they followed was to use minimal force that was reasonable under the circumstances, or was it that they may use proportional force, i.e., if punched, they can punch, if kicked, they can kick? What do you proffer the testimony is likely to be here, counsel?

MR. SIDDIQI: If I can have just a moment, your Honor.

THE COURT: Thank you.

MR. SIDDIQI: Your Honor, my co-counsel has reminded me at this point that we moved *in limine* to not enter into a discussion with regards to DOC policies precisely because the question in this case is whether or not the conduct was appropriate under the relevant constitutional law.

THE COURT: Thank you.

So counsel, in response to my question, do you anticipate that there will be no testimony regarding the

policies or practices so that the defense will not be putting in evidence regarding policies or practices that informed their conduct?

MR. SIDDIQI: I don't anticipate eliciting any testimony to that effect.

THE COURT: Thank you. Good.

So with that proffer, counsel for plaintiff, what's your position?

MR. LICHTMACHER: Well, according to the sentence that's in there, "appropriately deferred to policies and practices," etc., and there being offered no policies and practices, so that should come out. I mean, it's clear. What policies and practices? It's up in the air. What are we talking about? You know, the jury is going to be left with a blank. Simplest way is to strike the extra section that I suggested, your Honor.

THE COURT: Thank you.

And to be clear, the language here refers to both policies and practices. Counsel for defendants, in light of that, what is your view?

MR. SIDDIQI: Your Honor, at this point I think that we have no problem taking that sentence out of the charge -- I'm sorry -- that clause out of the charge, starting from "appropriately," ending at "institutional security."

THE COURT: Thank you.

Counsel for plaintiff, counsel for defendants have proposed that based on the evidence that they anticipate will be proffered at trial that this language need not be presented to the jury because no facts will be presented to the jury that will trigger its application.

Let me say at the outset that this language is legally correct. It is based on the language of the Supreme Court in the *Kingsley* decision. I believe that a charge including this language is legally accurate. However, at this stage I understand from the parties that there will be no evidence that will go to this point during the individual liability stage of the case, and as a result, I would be prepared to remove it based on that proffer.

I'm not making a determination that Nuñez stands for the proposition that counsel for plaintiff has stated. But based on the proffer by counsel regarding the evidence that would be presented, I'm prepared to delete that text, which I expect I will be doing without objection by plaintiff, since it is the substance of his request. I just want to be very clear that the basis for the Court's acceptance of this is the defendants' acceptance of this and that I am not making a conclusion that Nuñez stands for the proposition described by counsel for plaintiff previously.

With respect to the related issue -- namely, whether I should change the preliminary legal instructions that I

provided to the jury -- I will ask the parties what your views are. To be very clear, the instructions that I read the jury regarding the law here was the language that was specifically agreed to by the parties, meaning plaintiff and defendants, prior to trial. This was not objected to, and despite the fact that I provided the specific language to the parties to review and despite the fact that that language was derived from language that was commonly provided to the Court. So the reason why I read approximately this language to the jury at the outset was because it was agreed upon by all parties.

A question here is whether there is any value to going back and saying to ignore what I told them earlier or whether we should rely on the fact that I told them previously that the preliminary instructions were not the guiding instructions but that rather the final instructions would apply. Counsel, what are your respective views?

MR. LICHTMACHER: With that addendum, which actually was included originally, I understand that my application was unnecessary. My application was to strike the section of the charge but the application was made in terms of the curative instruction, so I abandoned that. So thank you, your Honor. I appreciate you instructing me on that.

THE COURT: Thank you. That's not a problem.

Good. So thank you very much, counsel. I will make that change. Thank you for raising the issue, counsel. I

would be happy to engage in a further academic discussion of the issue because it is an interesting one, but we need not because we have a practical solution.

Counsel, who has the next subsequent change?

Counsel for plaintiff, where's your next change?

MR. SIDDIQI: Your Honor, while we're still kind of on this topic, I just wanted to raise one issue for the sake of completeness.

With regards to testimony that will be elicited, this has nothing to do with the policy on force, but Captain Bell will testify that it is the policy of DOC that female staff is not to be present for the strip search of a male inmate. So while we're discussing policies, just for the sake of completeness, I wanted to put that on the record.

THE COURT: Thank you. I don't understand there to be any concern regarding that. Counsel, please let me know if that's incorrect.

Counsel for plaintiff, can you tell me where your next change is. I understand that counsel for defendants wish to introduce additional language to this section of the charge.

MR. LICHTMACHER: This section? Well, when we get to page 23, E, Mitigation of Damages.

THE COURT: Fine. Thank you. We'll be there momentarily, counsel for plaintiff.

MR. LICHTMACHER: Other than that, I'm okay.

THE COURT: Good. So counsel for defendants, what language do you wish to include in the excessive force component of the charge?

MS. GOYKADOSH: On page 17 of our proposed charge, on the bottom of the page, we included the language that starts -- this is the last full sentence -- "Officers can use objectively reasonable force --"

THE COURT: I'm sorry. Give me a moment.

MS. GOYKADOSH: Sure.

THE COURT: Thank you.

I apologize. I'm looking at the joint proposed charge. I don't see page numbers.

MS. GOYKADOSH: I apologize, your Honor. There are no page numbers. I'm referring to the ECF pagination.

THE COURT: Thank you. Sorry. Give me one moment, please.

Thank you. Please go on.

MS. GOYKADOSH: Starts, "Officers can use objectively reasonable force to protect themselves from a plaintiff's threat." And then the next sentence reads, "Minor scrapes, bumps, or bruises potentially could occur, often unintended, and an officer cannot be held liable for every such incident." We would just ask that that language be included in the jury charge as well.

THE COURT: Thank you.

Counsel for plaintiff.

MR. LICHTMACHER: There's no reason to include the de minimis injuries in the charge. It's really not important, so I don't think it changes anything at all.

THE COURT: Thank you.

MR. LICHTMACHER: And I don't think a jury is going to award anything if he's only got minor bumps and bruises.

THE COURT: Thank you.

MS. GOYKADOSH: Respectfully, your Honor, I think it is important, and plaintiff did not object to it, and we would like this language included, and if the only reason is that it's not important, we think it is important, and it's only two sentences.

THE COURT: Thank you.

Referring to the two sentences that carry over from the bottom of page 17 to the top of 18, I understand that they're not objected to or were not objected to by plaintiff in the joint charges.

MR. LICHTMACHER: They were not, Judge.

THE COURT: Thank you.

Are they legally inaccurate? I did not include them largely because I did not think they were necessary, but I also don't believe them to be legally inaccurate and I don't understand there to be an argument that they are not. So barring objection by counsel, I would accept the change.

MR. LICHTMACHER: I do object, your Honor. You do have the "push and shove" language in here that we always use in these cases. I'm pretty sure that's in here. I think I just read it. You know, "not every push and shove..."

THE COURT: Thank you. Yes, that appears in the following language after the language that we just discussed deleting. So the question is really the two carryover sentences. Let's talk about each of them in turn.

First is, "Officers can use objectively reasonable force to protect themselves from a plaintiff's threat." That I think is implicit from the remaining charges. Counsel for plaintiff, any concern regarding the addition of that language to precede the existing sentence that relates to "push or shove"?

(Continued on next page)

MR. LICHTMACHER: I think it's really in there already implicitly if not explicitly. You talk about: The question is only whether the action defendant you are considering objectively unreasonable in light of all the facts and circumstances confronting him or her."

I mean, I believe that covers it, that and the push and shove I don't see why we need more language there.

THE COURT: Thank you. Good.

So, counsel for defendants, I understand the principal discussion here regarding the minor scrapes, bumps and bruises language.

What's the purpose of this? I understand it may be considered, I'll call it, a push instruction, which I understand to be the basis for plaintiff's objection because it states that an officer cannot be held liable for every such incident. What's the basis for the inclusion of that sentence? I should say that I'm willing to include the prior sentence. I don't understand there to be a substantive objection to it. I believe it may arguably be redundant, but it's not legally incorrect and does not appear to problematic.

The following sentence, however, has been objected to on the basis that I just described and as you've heard from counsel for plaintiff.

Any further argument regarding why that carryover sentence from pages 17 to 18 should be included?

MS. GOYKADOSH: Yes, your Honor. I believe it is an actually very important sentence, and I believe that it needs to be explicitly instructed to the jury, and the reason for that is that: Number one, it goes to plaintiff's alleged injuries. And in this case there will be testimony that there was a struggle with plaintiff in his cell because he was resisting after punching Corrections Officer Mitchell. And even in line with plaintiff's own testimony, he says that he was on the floor of the cell. So there will certainly be testimony by both parties that plaintiff was not handcuffed -- or, I'm sorry -- plaintiff was not immediately removed from the cell after punching Corrections Officer Mitchell because of this resistance, or, if we go according to plaintiff's own allegations, because he was on the floor of the cell.

So I think --

THE COURT: Sorry. To be clear, we are focused on the sentence that talks about "minor scrapes, bumps or bruises potentially could occur, often unintended. An officer cannot be held liable for every such incident."

I understand from prior proffer that we are not talking about unintended minor scrapes or bumps or bruises, but rather as just proffered by counsel, the officer intentionally punched Mr. McCurdy in order to respond to being struck himself.

So what is the relevance or significance of the

instruction regarding unintended scrapes or bruises in the context of a case in which the proffer is that the officer intentionally punched the plaintiff?

MS. GOYKADOSH: So the relevance is that after the officer intentionally punched the plaintiff after the plaintiff punched him, at that point plaintiff resisted being handcuffed, and he was brought down to the floor of the cell, and there was a struggle as they attempted to gain control. And that struggle might have caused minor bumps or bruises or scrapes.

So that's the relevance of that language. It goes to plaintiff's actions. There is going to be testimony about the struggle after the punch.

MR. LICHTMACHER: Your Honor, if I may, I don't think any part of the instructions will be instructing the jury that if he got minor bumps and bruises while rolling around on a floor resisting and putting the handcuffs on or whatever that, you know, that that's compensable. No part of the instruction says that, and that's what the defendant is trying to back door; that if they hit him and the harm was only relatively minor or saying de minimus, this is what they're back-dooring, then, oh, you know, you can't find them liable for that.

It's different. If they want to say he got minor cuts and bruises rolling around on the floor while he was resisting being handcuffed, that's something else. No jury is going to find them liable for that. But if they did in fact punch him

numerous times and kick him numerous times and he got bruises and he got relatively minor, in the big picture, you know, bruises and scrapes all over his body and pains, you know, then a jury could think, oh, well, you know, they're minor, so we can't compensate him for that, when in fact that's not the law.

So it's not about a de minimus injury. This is about how it was incurred. This really goes to causation. If you want a sentence about them rolling around on the floor, and he gets minor scrapes and bruises and he hurts himself and those aren't compensable, that's something else. That's not what they're talking about here.

MS. GOYKADOSH: Your Honor, respectfully, number one is that there's been no proffer with regard to kicks, as I believe plaintiff's counsel just mentioned. There was a proffer earlier with regards to a punch. However, there hasn't been any proffer with regard to a kick.

But getting back to this language on pages 17 and 18, again there was no previous objection. There is an objection being raised now. There is no objection from plaintiff's counsel based on the fact that this might be legally inaccurate. From what I'm understanding, the objection just appears to be based on the fact that the jury is just going to understand that if it's de minimus, they shouldn't compensate him for that, but I would like that language to be explicitly said to the jury. I can't depend on the jury maybe

understanding something. I think it's very helpful to have that language explicitly to the jury.

THE COURT: Thank you.

Anything further, counsel for plaintiff?

MR. LICHTMACHER: I don't want to be negative, but I think the entire argument was off point that I just heard. Proffer about kicks. Yeah, he testified he'd been kicked. That's my proffer about kicks. He testified about it, and, again, it would be illegal to tell a jury, it would be improper, it would not be correct law to tell the jury that as a result of being intentionally kicked and punched, as opposed to rolling around on the floor possibly while, you know, allegedly resisting whatever they're doing, that, you know, he can't be compensated for that, and that's my problem with it.

THE COURT: Thank you.

MR. LICHTMACHER: And it's in the context of the entire charge that I raise it now.

THE COURT: Good. Thank you.

I agree with counsel for plaintiff on this point. I think that the requested sentence is what I will call a push instruction. The request would have me tell the jury that an officer cannot be held liable for minor scrapes, bumps or bruises. That's not accurate. I understand this may be intended to describe circumstances in which unintended consequences of the use of force -- I should say, that certain

uses of force may lead to minor bruises which are not themselves compensable, but to the extent that this is intended to be a summary of the broader legal principles related to this concept, I fear that, as counsel for plaintiff has described, that it is a compression of those principles in a way that could be confusing because it says that, as I stated earlier, "minor scrapes, bumps or bruises could occur ... an officer cannot be held liable for every such incident." The law is not that. If he received minor scrapes, bumps or bruises as a result of the use of excessive force, the officer could be held liable for it. So I'm concerned about this compression of the law which I believe may lead to, I'll call it, confusion in the eyes of the jurors and the underlying legal principles that we've appropriately accounted for in the other sections of the charge.

So I will include the language at the bottom of page 17 of ECF No. 128 immediately following the deleted text that we just discussed, but I will not include the language regarding minor scrapes. We do have language already that says that not every push or shove that may lead or seem unnecessary violates the Constitution, which I think begins to address the -- or addresses adequately the issue that's been raised.

Counsel for plaintiff's next comment is on page 23.

Counsel for defendants, do you have any changes prior to that?

MS. GOYKADOSH: My next changes are on page 23 as well, your Honor.

THE COURT: Good. Thank you.

So, counsel for plaintiff, where is your change on page 23?

MR. LICHTMACHER: Section E should be omitted in its entirety. You can't mitigate your damages when you're in jail. You can't go to Mount Sinai Hospital. You can't call for a doctor. You can't take an Uber somewhere to go get medicine. So I can't see how this could possibly be relevant to this case.

THE COURT: Thank you.

Counsel for defendant.

MR. LICHTMACHER: And if I may, I was not aware of exactly when he was released after this, you know, initially. Now I have a much better idea, and I realize this would have been completely impossible, so factually it's off.

THE COURT: Counsel for defendants, is this something that you expect to try to prove?

MS. GOYKADOSH: No, your Honor. That was why we were going to say as well that we did not think that a charge on mitigation of damages was necessary.

THE COURT: Thank you. I will strike it. Good.

Counsel for plaintiff, where's your next change?

MR. LICHTMACHER: Nothing further.

THE COURT: Good.

Counsel for defendants, where, if anything, is your next change?

MS. GOYKADOSH: Also on page 23 with regards to punitive damages, we don't think that punitive damages are appropriate in this case. I mean, obviously the evidence hasn't yet been presented, but I don't believe that there will be a factual predicate in the trial record that either of the defendants' conduct was motivated by evil motive or intent or that either of the defendants acted with callous indifference to the federally protected rights of plaintiff.

A party is not entitled to have the court give an instruction for which there is no factual predicate in the record. Again, I don't believe there will be a factual predicate in the record, and in order to justify an award of punitive damages, the defendants' unlawful conduct must surpass a certain threshold. So here there needs to be something in the record that would support the charge of punitive damages and also the question of punitive damages on the verdict form,

I know we're not there yet, but for both of these things, there simply isn't anything at this point that I believe would support that charge. There is nothing in the record that supports any evil intent, any wrongdoing, and I don't anticipate that there will be anything in the trial record as well. So we would ask that the jury not be charged

on punitive damages in this case.

THE COURT: Thank you.

Yes, Counsel?

MR. LICHTMACHER: Your Honor, it's too early for that application, your Honor, and I'm pretty positive the plaintiff is going to say he was on the floor in handcuffs getting punched and kicked all over his body, and that would support punitive damages.

THE COURT: Good. Thank you very much.

So I agree with counsel for defendants that there is nothing in the record at this point that supports putting this charge to the jury, but that's largely because there's nothing on the record. I will entertain a request to exclude this proposed charge after the evidence is in.

Let's engage in a brief conversation now, however, based on the proffer by counsel for plaintiff.

Counsel, assuming that the evidence is as counsel has described that plaintiff was on the floor and handcuffed and was being kicked by the defendants, do you anticipate making an application to the Court to remove the punitive damages instruction if the facts develop as I just described?

MS. GOYKADOSH: Your Honor, if the facts do develop that way, I think there would also need to be something in addition to plaintiff being on the floor handcuffed and kicked that would support a motive or an intent. So the facts in and

of themselves, I do not believe are sufficient. I turn to a case by Judge Matsumoto. This was *Bermudez v. The City of New York*, and the facts in that case were that the plaintiff was on the ground, and he said that he was hit on the head with an asp.

THE COURT: I'm sorry, with a what?

MS. GOYKADOSH: That the police officers hit him on the head with an asp, with a baton. It's a type of baton.

THE COURT: Thank you.

MS. GOYKADOSH: In that case, Judge Matsumoto declined to charge the jury on punitive damages because there wasn't anything in the record about the officers' evil intent or motive.

THE COURT: I'm sorry, can I ask, was the plaintiff restrained in the *Bermudez* case?

MS. GOYKADOSH: He was not.

THE COURT: Thank you.

Do you see a factual distinction between hitting someone while they're in handcuffs and when they're not?

MS. GOYKADOSH: I do, your Honor, but at the same time I still think that there would need to be testimony about evil intents and motives. I think what I'm trying to say is that the fact of the actions in and of themselves without anything about motives or evil intents is not enough.

THE COURT: Thank you. Just to help me understand the

argument, what type of evidence of evil intent would you believe would be necessary?

MS. GOYKADOSH: Testimony from the individuals who are alleged to have used the force as to why they did what they did.

THE COURT: Thank you. Fine.

I will take up this issue if and when the question is put to the Court following the submission of evidence. I will just briefly observe that frequently intent is something that one must infer from a person's conduct rather than expecting that you can necessarily get precise words that were coursing through their minds at the time.

So I do not accept as matter of principle at this point that the only way to prove intent is by having the witness accused of acting evilly presenting express testimony conceding that they acted in a evil manner. I do not endorse that as a legal matter. I will entertain any arguments regarding whether or not the evidence presented supports the punitive damages instruction after the evidence is in.

I do note the distinction between kicking someone who is restrained on the ground and potentially hitting somebody with an asp who is still resisting arrest and who is not restrained.

Good. So I will defer ruling on this issue. Please raise it with the Court if you wish to raise this issue

following the admission of evidence regarding this matter. I will include it in the proposed charge, and I will leave it to counsel to raise the issue again in the event that the evidence as presented does not in their view support the charge.

Where is the parties' next potential change?

Counsel for plaintiff?

MR. LICHTMACHER: I have nothing further.

THE COURT: Thank you.

Counsel for defendants?

MS. GOYKADOSH: Nothing further for the charge, your Honor.

THE COURT: Good.

Thank you. So let's turn to the verdict sheet.

MR. LICHTMACHER: I don't have one here, your Honor.

THE COURT: Thank you. We will have one handed to you.

MR. SIDDIQI: Your Honor, I have an extra copy I can give it to Mr. Lichtmacher.

MR. LICHTMACHER: Thank you, Omar. Appreciate it.

THE COURT: Good. Please do.

I am looking at the proposed verdict form. Counsel, where is the first change, or proposed change?

First, counsel for plaintiff.

MR. LICHTMACHER: A half a moment, your Honor.

THE COURT: Thank you.

Counsel for defendants?

MS. GOYKADOSH: Page 2, your Honor.

THE COURT: Good. Thank you. Please proceed.

MS. GOYKADOSH: On page 2, question 2B, that's the question with regards to nominal damages. It's not necessarily an objection per se, but I was just wondering whether the Court would like to do a stand-alone question for nominal damages. I think it just might be clearer. But that's all I have to say about that.

MR. LICHTMACHER: Your Honor, I think it's clear the way it is. It's fine.

THE COURT: Thank you.

MR. LICHTMACHER: It's a very direct verdict sheet.

THE COURT: Thank you. Give me one moment.

Thank you.

I believe that the way it's presented is accurate. Counsel for defendants, can you articulate what the concern is?

MS. GOYKADOSH: My concern, your Honor, is just that it gets a little bit buried in there, and I think that if it were a stand-alone, it might be easier to follow along, but again, this is not something that we're necessarily objecting to. It's just a matter of formatting.

THE COURT: Thank you. My preference would be to keep it as it is. The reason why I say that is because both A and B within subsection 2 flow from the baseline answer to question

2. So 2A tells them what to do if they answer yes. 2B tells them what to do if they answer no. Of course, they only get to 2 at all if they've found liability under question 1.

So I believe that this is accurate, and I believe that the logic of including both potential consequences of each of the potential responses to question 2 is appropriate underneath question 2 as subsections A and B is described here.

Counsel for defendants, anything else?

MS. GOYKADOSH: Yes, your Honor. On page 3.

THE COURT: Please.

MS. GOYKADOSH: So the punitive damages question on page 3 reads: "Did plaintiff prove by a preponderance of the evidence that he is entitled to punitive damages against either defendant?"

And we would propose that it read: "Did plaintiff prove by a preponderance of the evidence that he is entitled to be awarded punitive damages?" So we would add those three words.

THE COURT: Thank you.

Counsel for plaintiff, any concern about that proposed modification?

MR. LICHTMACHER: "Awarded" is always a little bit of a loaded word, your Honor, for a plaintiff. It makes it seem like there's an extra barrier to meet. You know, that it's like, oh, you're giving him an award, especially with somebody

in jail. I think the simpler language is more direct, and it is in no way injurious to the plaintiff or prejudicial to the plaintiff. The language is perfect.

THE COURT: Thank you.

Counsel for defendants, any further argument?

MS. GOYKADOSH: No, your Honor.

THE COURT: Is the language as provided believed to be inaccurate?

MS. GOYKADOSH: I don't believe so, your Honor.

THE COURT: Thank you.

I will leave it as is. I believe that it is legally accurate, and it is simple. My preference is for the, I'll call it, substance of the instructions with respect to each of these things to be in the charges and to have the verdict sheet itself do little work. I appreciate the argument by plaintiff that the word "award" has some normative associations but that its inclusion here is potentially prejudicial to him. Since it's unnecessary, I will decline to make that change.

Good.

MS. GOYKADOSH: Your Honor, I have one more thing, I'm sorry.

THE COURT: Please, go ahead.

MS. GOYKADOSH: In the language that's all in caps locks.

THE COURT: Yes, give me one moment, please. Yes.

Please proceed.

MS. GOYKADOSH: So it currently reads, "Please indicate in the space provided the amount of punitive damages as to each of the defendants below."

So, we would just propose that it read: "Please indicate the amount of punitive damages that plaintiff has proven he is entitled to recover against each defendant in the space below."

THE COURT: So can I restate that as a request that I include the words "plaintiff has proven" after the word "damages." So that the all caps language would read in full: "If you answered yes to question 3, please indicate in the space provided the amount of punitive damages plaintiff has proven as to each of the defendants below."

Is that accurate, counsel for defendants?

MS. GOYKADOSH: Your Honor, we believe that the word "entitled" should be included. However, we do appreciate the Court's inclusion of those two additional words "has proven." So if that is what is the Court's decision is, then that is fine, your Honor.

THE COURT: Thank you.

Counsel for plaintiff, any concerns about the words "plaintiff has proven" with respect to an award of punitive damages?

MR. LICHTMACHER: Yes, you don't really -- it's my

understanding, and I'm sure the Court will correct me if I'm wrong, you don't really prove punitive damages. It's something that the jury assesses to punish somebody if they found they acted particularly egregiously. So usually the language I've seen is like, you know, an amount that is appropriate for, you know, the actions incurred or whatever, anything like that. I think I gave you language to that last night, but I may not have. I did it late. And late in two ways.

But, nevertheless, usually the language is not what he's proving, because you don't prove them. What you do -- I'm being redundant. What you do is show it was a heinous act, and because it was a heinous act, how much does the jury decide to award the plaintiff, you know, as punishment? And that's not the word they usually use, but, you know, it would be appropriate pursuant to the actions that defendant took. But proof? I can't prove punitive damages. There's no way. You can prove compensatory damages. Punitive damages are something that the jury decides by themselves, and that language is wrong, in my opinion.

THE COURT: Thank you. That's fine. Good.

So I would decline to make the change for substantially those reasons. The verdict sheet as written is accurate. The substance of the effort that the jury must undertake in order to assess punitive damages described in the proposed charge, assuming that I administer it, and @fraying

their determination in the verdict sheet itself is unnecessary, so I decline to make that change.

MR. LICHTMACHER: Your Honor, if you could just leave the word "proven" out. If you could just leave that word out, I have no objection to it.

THE COURT: I'll just leave it as it is. Good.

So thank you very much. Counsel, I will circulate a revised version of the charges. I don't believe that I've implemented changes to the verdict sheet as a result of today's conference.

As I said earlier, I expect that counsel will raise any issues with respect to the appropriateness of the punitive damages instruction following the introduction of evidence and prior to my review of the charge with the jury. Please do so promptly following the introduction of this evidence so that I can consider it.

MS. GOYKADOSH: Your Honor?

THE COURT: Yes.

MS. GOYKADOSH: I'm so sorry to interrupt. Just one thing just, going back to the punitive damages question.

THE COURT: Please.

MS. GOYKADOSH: The punitive damages charge currently reads: "You may award punitive damages against the defendant if plaintiff has proven by a preponderance of the evidence that the defendants' conduct was malicious or involved reckless or

callous indifference." So, I mean, I think it just mirrors the charge to include the "has proven" language.

THE COURT: Thank you.

Let me just respond by explaining how I understand plaintiff to read the verdict sheet and what the distinction is.

In the introduction of paragraph three, it requires a plaintiff prove by preponderance of the evidence that he's entitled to punitive damages; i.e., has he proven that according to the language that you just described that the defendants acted with the degree of culpability that's articulated there. So, that degree of proof is encompassed in paragraph 3, and plaintiff's counsel has not taken issue with that.

The question that he has raised is whether there is a particular quantum of proof as to the amount of punitive damages in the same way that one would prove consequential damages. One must prove punitive damages in the same way; i.e., this is the specific amount that is warranted. Counsel for plaintiff has taken the position that punitive damages or substantive was distinct from something like consequential damages.

So just to respond briefly to the language from the charge that you just pointed to, I understand plaintiff to not take issue with the obligation that plaintiff prove those

things by preponderance of the evidence. My understanding is evidenced by the fact that he did not object to the text of paragraph three of the verdict sheet. Rather, the issue related here relates to the amount of punitive damages, which is not addressed by the portion of the charge which you just read.

MS. GOYKADOSH: Thank you, your Honor.

THE COURT: Thank you.

Good. So, anything else that we should take up, Counsel, before we adjourn for the day or recess for the day?

My hope is that Mr. McCurdy will be here ready to proceed. Counsel, I hate to ask because I'm sure that you have this in hand, but what about his clothes?

MR. LICHTMACHER: Well, unfortunately, the person who has his clothes, his mother, has proven unavailable. I will try tonight to see if she can drop it somewhere where maybe she can bring it to the court before work. And I haven't been lucky with this so far. I have contacted with her. I have spoken to her. I will call her again when I get back to the office and attempt to.

THE COURT: Thank you. Please do work on that hard. We will need to proceed early in the morning. I prefer for them not to see him in Rikers garb.

MR. LICHTMACHER: He's not in Rikers garb.

THE COURT: Good.

MR. LICHTMACHER: He's not convicted, so he's in some combination, I don't know that much about it, of what's allowable, but it's not an orange jump suit or anything like that.

THE COURT: That's good to hear. Thank you.

MR. LICHTMACHER: One more thing. The medical records review we're going to argue, excuse me, discuss it tonight and I don't think there's any possibility we could get it to you by 7:00 considering the late hour now. So if we could have a little more time with that, maybe a couple more hours, we can get it in. My adversary is going to provide what she thinks should be redacted. I'll comment on it, and we can email that to you. But I won't get back to my office till 6:00.

THE COURT: Thank you. Let me propose this. First, I'd be happy to give you a moderate amount of additional time, but I also don't know that that's necessary. What I believe that you can do, which would be relatively straightforward, is to use some space here to sit together and highlight the relevant language. If you're all in the same room, it would take out a step of circulating it. I can hand the parties a highlighter and you can highlight the things that you think should be redacted, and you can show me where there are areas of dispute relatively expeditiously. That is an option.

That said, I'd be happy to give you until 8:00, but I just want to let you know that you may wish to simply do this

work in person rather than batting drafts back and forth.

MR. LICHTMACHER: I think I prefer the in-person option. I think my adversary does.

MS. GOYKADOSH: Yes, your Honor, we would prefer the in-person option, but I just want to be clear about something. We're going to confer with plaintiff's counsel hopefully now, and hopefully we will come to an agreement as to what should be redacted, but the person who is doing the redaction is Mr. Lichtmacher because he is the one that's going to introduce the records. Is that correct?

THE COURT: Thank you. Correct. Him introducing the records will implement them.

MR. LICHTMACHER: After the redactions are agreed to. Of course, I'm not going to send a redacted copy and say I want to make changes.

THE COURT: I'm sorry, would you say that again? I missed your last comment.

MR. LICHTMACHER: I'm not going to send redacted copy and say do you want to make changes now? So after we get it confirmed, and I'm sure we will have some discussions with the Court, then I will sit here and do the redactions.

THE COURT: My hope is that the parties will reach substantial agreement on these things, in part because I expect that they will be introduced at some point during the course of trial day tomorrow. You should make arrangements to finalize

any redactions following the Court's ruling on any issues early in the day. If that requires that you have a PDF on a laptop so that you can quickly implement the redactions, you should have one. But I don't expect that we will be taking a substantial break in the trial day in order to accomplish these redactions. So I expect that the parties will (A) work to try to identify as many areas of agreement as you can. And, (B), that you will be prepared to make any mechanical changes to the document promptly tomorrow so that the redacted version can be presented to the jurors.

MR. LICHTMACHER: If it please the Court, I could bring a redacting pen. I do not have a laptop with facilities that could make redactions. We only have one computer in my office like that. But I could bring a redacted pen and they're pretty quick.

THE COURT: That's fine. Good. Anything else before we recess?

MR. LICHTMACHER: Small item.

THE COURT: Yes.

MR. LICHTMACHER: Can I leave my bag with some of my important stuff here?

THE COURT: We will be locking the courtroom. I will not be unlocking it until tomorrow morning. This is still, however, not a thoroughly secured space. I think it's pretty secure, but there will be other people that will have access to

the space. I have no other proceedings here between today and the beginning of trial tomorrow.

MR. LICHTMACHER: I guess the answer is yes at my own risk.

THE COURT: Yes, at your own risk.

MR. LICHTMACHER: I'll take the risk, your Honor.

THE COURT: Fine. Good.

Anything else counsel for defendants?

MS. GOYKADOSH: No, your Honor.

THE COURT: Good I'll see you all here tomorrow morning. Please be here at 9:00.

(Trial continued on September 4, 2019 at 9:00 a.m.)